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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 937

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and NORTH SHORE COMMUTERS ASSOCIATION,
(Plaintiffs) Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY,
(Defendants) Appellees.

APPEAL FROM THE DECREE OF A UNITED STATES DISTRICT COURT OF THREE JUDGES SITTING IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

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IN THE

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STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and NORTH SHORE COMMUTERS ASSOCIATION,
(Plaintiffs) Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY,
(Defendants) Appellees.

APPEAL FROM THE DECREE OF A UNITED STATES DISTRICT COURT OF THREE JUDGES SITTING IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

JURISDICTIONAL STATEMENT.

This case is before this Court on appeal by the State of Illinois and Illinois Commerce Commission, and the North Shore Commuters Association (Plaintiffs, below) from a final judgment and decree of a three-judge District Court (Appendix hereto, pp. i-ii) dismissing Plaintiffs' complaint and denying the prayer for a decree setting

aside and permanently enjoining enforcement of an order of the Interstate Commerce Commission authorizing Chicago, North Shore & Milwaukee Railway (hereinafter referred to as "the North Shore") to abandon its entire railroad.

Appellants submit this jurisdictional statement, pursuant to Rule 15, to show: (1) that this Court has jurisdiction of these appeals, and (2) that the questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

A.

THE OPINION BELOW.

The opinion of the three-judge District Court has not yet been reported. It is set forth in the Appendix to this Statement, at pages iii to xviii.

B.

THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1.

The Nature of the Proceeding and the Statute Pursuant to Which It Is Brought.

(a)

The Complaint and the Relief Prayed.

This action was instituted by a complaint filed June 10, 1962, and a supplemental complaint filed October 24, 1962. The complaint, as supplemented, sought to set aside and

to enjoin enforcement of an order of the Interstate Commerce Commission entered May 10, 1962, as confirmed by order entered October 15, 1962 authorizing North Shore to abandon its entire railroad, including interstate operations between Chicago and Milwaukee and intermediate points, and intrastate operations between Chicago and suburban communities to the north in Illinois.

The order of the Commission sought to be set aside was entered on application of the North Shore for leave to abandon the railroad, filed under Section 1, Paragraph (18) of the Interstate Commerce Act (Title 49 USC) (set forth in Appendix, pp. xxxviii to xxxix).

The complaint attacked the validity of the Commission's order, purporting to authorize the abandonment, on the following grounds:

(1) The North Shore's railroad is exempted from jurisdiction of the Interstate Commerce Commission to authorize abandonment, by Section 1, Paragraph (22) of the Interstate Commerce Act (Title 49 USC) (Appendix p. xxxix), reading as follows:

> "(22) The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The Appellants (Plaintiffs, below) contend that (as held by this Court in *United States* v. *Chicago, North Shore & Milwaukee Railroad Company*, 288 U. S. 1, in construing an identical exemption in another section of the same statute) North Shore's railroad is "an interurban electric railway which is not a part or parts of a general steam

railroad system of transportation" and is therefore within the exemption in Section 1, Paragraph (22).

(2) If, contrary to the above contention, it is held that the North Shore's railroad is not exempted from the jurisdiction of the Commission by Section 1, Paragraph (22) of the Interstate Commerce Act, the Commission had no jurisdiction to authorize abandonment of the separate intrastate operations.

(b)

The Orders Of The Interstate Commerce Commission.

The final order of the Interstate Commerce Commission (not yet reported), purporting to authorize abandonment of the North Shore's railroad, was entered on October 15, 1962. It supplemented and adhered to a prior order entered May 10, 1962, reported 317 ICC 191, which had also authorized abandonment, the effective date of which had been suspended, pending determination of a petition for reconsideration.

Extracts from the reports and orders of the Interstate Commerce Commission, including the parts thereof relating to the jurisdictional questions here involved, are set forth in the Appendix hereto at the following pages:

The report and order of October 15, 1962 (not reported), at pages xix to xxvii of the Appendix;

The report and order of May 10, 1962 (317 ICC 191) at pages xxvii to xxx of the Appendix;

An interim report dated May 4, 1960 (312 ICC 99, incorporated by reference in the subsequent reports) at pages xxx to xxxiii of the Appendix.

(c)

The Statutes Conferring Jurisdiction On the District Court to Entertain This Action.

The right to maintain this action and the jurisdiction of the District Court are conferred by Paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49) and by Section 1336 of the Judicial Code (Title 28).

The Commission's order purporting to authorize abandonment rests on the supposed jurisdiction conferred by Paragraphs (18) and (20) of Section 1 of the Interstate Commerce Act. If, as Appellants contend, North Shore's railroad was exempted by Paragraph (22) of Section 1 from the jurisdiction of the Commission under Paragraphs (18) to (20) of Section 1, there was no valid order authorizing abandonment. Enforcement of the Commission's order may therefore be enjoined under Paragraph (20) of Section 1, reading, so far as material, as follows (Appendix, p. xxxix):

> "(20) Any * * * abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

The right to maintain a similar action under Paragraph (20) of Section 1 was sustained in *United States* v. *Idaho*, 298 U. S. 105 (109-10).

Jurisdiction of the District Court over this action is also expressly conferred by Section 1336 of the Judicial Code (Title 28 USC) which reads as follows (Appendix, p. xl):

"Except as otherwise provided, the District Court

shall have jurisdiction of any civil actions to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

(d)

The Requirement for a Three-Judge Court.

Section 2325 of the Judicial Code (Title 28) requires that an action to set aside and enjoin enforcement of an order of the Interstate Commerce Commission be heard and determined by a three-judge court. Section 2325 reads as follows (Appendix, p. xl):

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a District Court of three judges under Section 2284 of this Title."

2.

The Decree Sought To Be Reviewed.

The decree, from which this appeal is taken, denying the application to set aside and enjoin enforcement of the order of the Interstate Commerce Commission, was entered December 10, 1962. A copy of the decree is set forth in the Appendix, pp. i to ii. No findings of fact or conclusions of law were incorporated in the decree or were filed separately.

Notice of appeal to this Court was filed in the United States District Court for the Northern District of Illinois, Eastern Division, by North Shore Commuters Association on December 21, 1962, and by the State of Illinois and Illinois Commerce Commission on February 7, 1963. Extracts from the Notices of Appeal, showing the questions presented thereby, are set forth in the Appendix at pages xxxiii to xxxvii.

The time for Appellant, North Shore Commuters Association, to file the record and docket the case in the Supreme Court of the United States was extended by order of the District Court to, and including, March 19, 1963 (Appendix p. xxxv).

3.

THE STATUTORY PROVISION CONFERRING ON THIS COURT JURISDICTION OF THE APPEAL.

Jurisdiction of this Court over this appeal from a decree of a three-judge District Court is conferred by Section 1253 of the Judicial Code (Title 28) reading as follows (Appendix, p. xl):

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding, required by Act of Congress to be heard and determined by a district court of three judges."

The exception noted in the foregoing quotation has no application here. It follows, therefore, that this Court has jurisdiction of this appeal.

The decision of this Court in *Chicago, Milwaukee, St. Paul & Pacific Ry.* v. *Illinois*, 355 U. S. 300 (302) sustained the jurisdiction of this Court on a like appeal from a decree of a three-judge District Court.

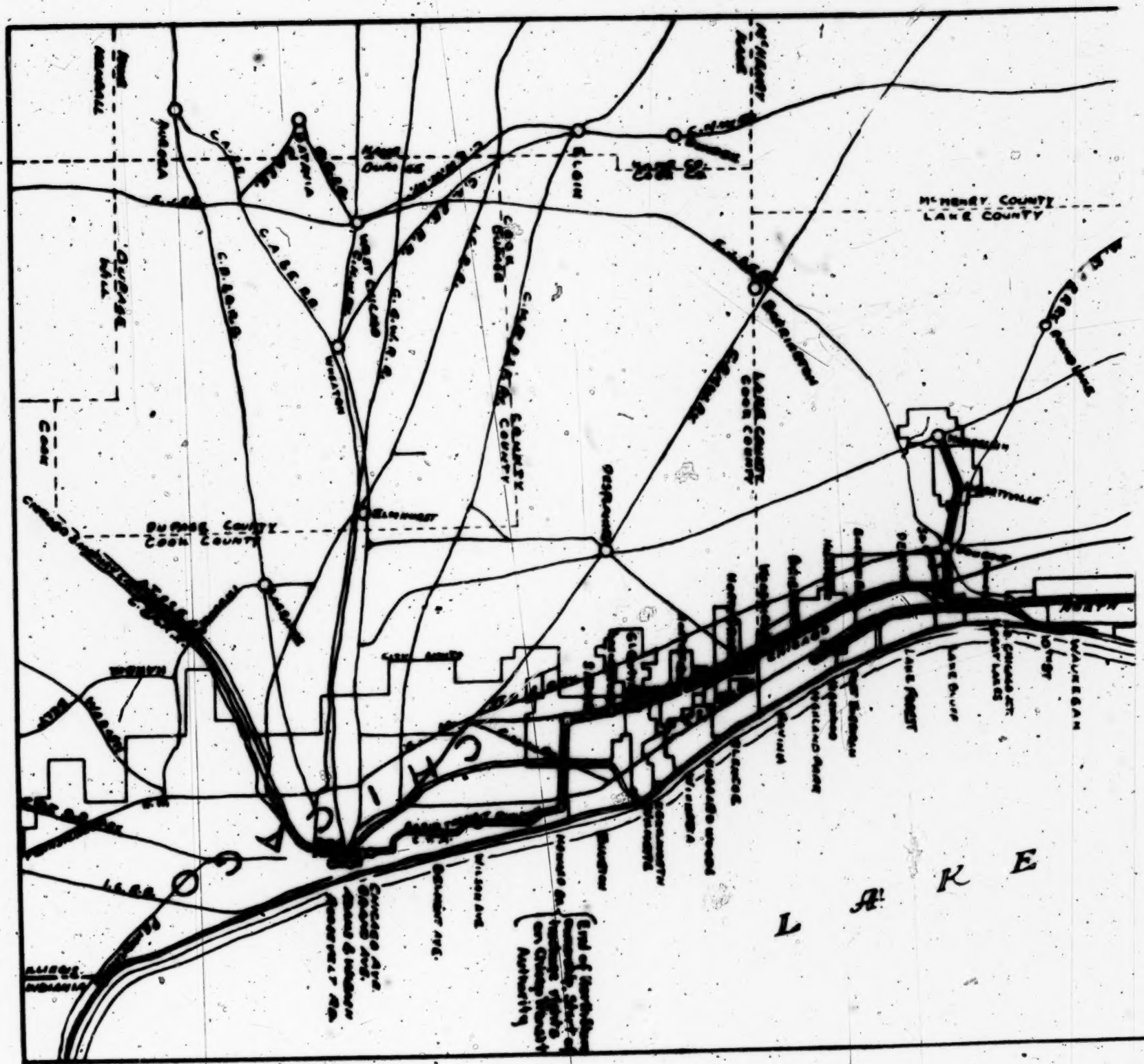
C.

THE QUESTIONS PRESENTED BY THE APPEAL.

The questions presented by this appeal are:

(1) Whether the three-judge District Court erred in holding that the North Shore's railroad is not "a street, suburban or interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation" and therefore is not excluded by Paragraph (22) of Section 1, Title 49 USC, from the jurisdiction of the Interstate Commerce Commission to authorize its abandonment; and

(2) Whether, assuming *arguendo* that the North Shore is not within the exclusion of Paragraph (22), Section 1, Title 49 USC, the Interstate Commerce Commission nevertheless has jurisdiction to authorize abandonment of that part of the North Shore's railroad which is wholly devoted to intrastate commerce.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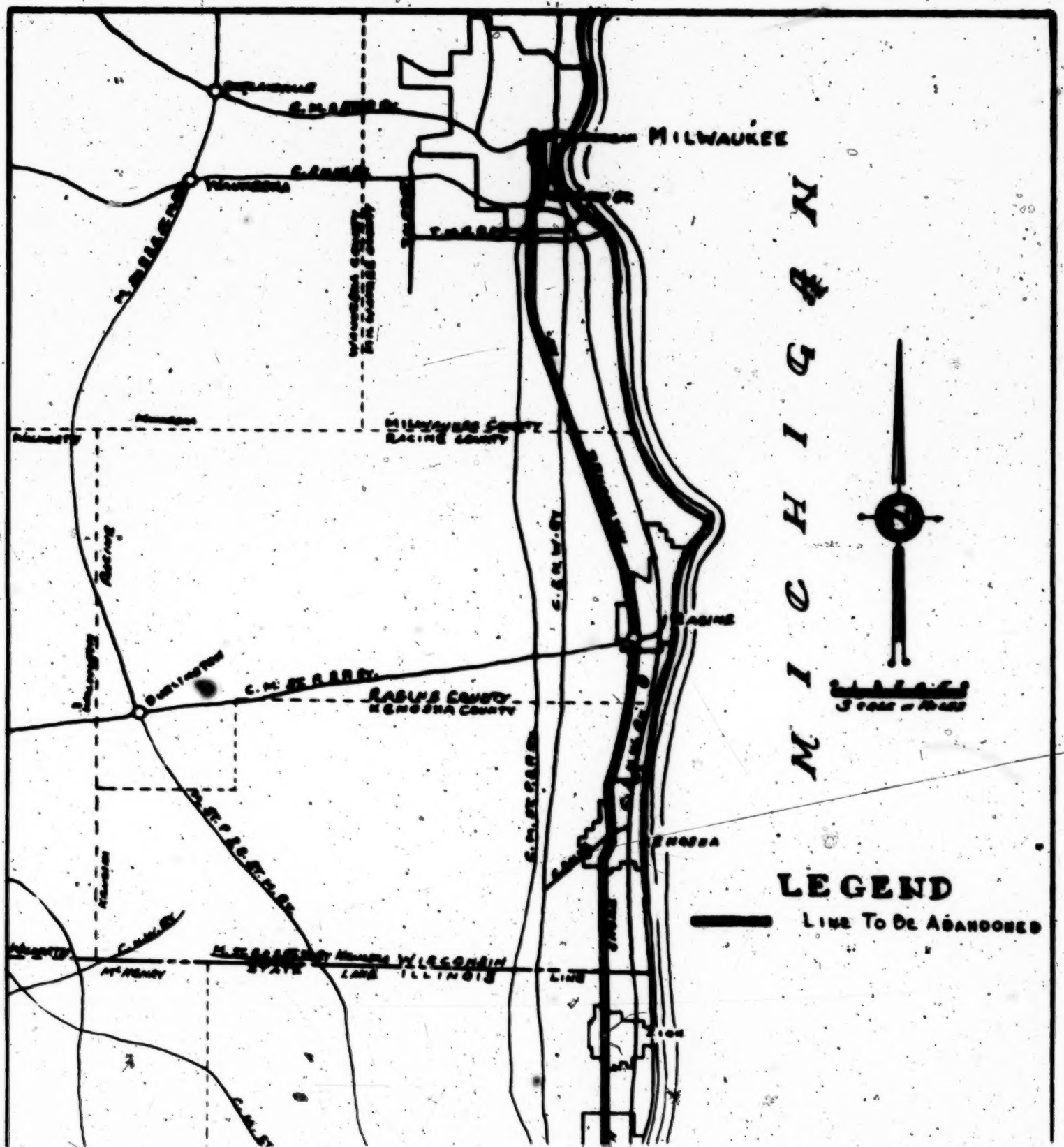
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MICHIGAN
RACINE COUNTY
KENOSHA COUNTY
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LEGEND
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D.

THE STATEMENT OF THE CASE.

1.

The Character of the North Shore's Railroad.

The North Shore operates an electric railroad, rendering two distinct passenger services:

1. An interstate service between Chicago and Milwaukee and intermediate points; and

2. Separate intrastate suburban services between Chicago and Mundelein, and between Chicago and Waukegan or Zion and intermediate suburban communities.

A plat showing the location of the rail lines is inserted opposite this page.

The southern terminus of the railroad is at the Roosevelt Road station of the elevated lines of the Chicago Transit Authority. The North Shore's trains run on the elevated tracks between Roosevelt Road and the Chicago city limits at Howard Street, stopping en route at various elevated stations in the downtown and north side districts of Chicago.

North from Howard Street, the trains run on a private right-of-way (the Skokie Valley Line) to a point a short distance west of Lake Bluff, where the Mundelein branch turns west to a terminus at Mundelein, and the Waukegan and Milwaukee branch continues north to the suburban terminus in Waukegan or Zion, Illinois, and thence (as to interstate traffic) into Wisconsin, through Kenosha and Racine to Milwaukee.

In Milwaukee, the trains operate in the street, on street-

car tracks owned by the Milwaukee Electric Railroad, a wholly-owned subsidiary of the North Shore.

The electric motor furnishing the power for each train is in the forward car, as in elevated or subway trains, and the cars resemble generally the cars used in such trains.

In 1958, the passenger traffic on the North Shore's railroad was divided between the intrastate and interstate services (Ex. 74), as follows:

	Number of Passengers	
Interstate		
Between Chicago or North Chicago Junction and Milwaukee		2,601,908
Intrastate		
Suburban service between Chicago and Waukegan or Zion	1,175,692	
Suburban service between Chicago and Mundelein	1,374,095	2,549,787
Total		5,151,695

For the 12 months ending May 31, 1961, due to rapid increase in population of the suburban areas served by the North Shore (Ex. 36), the traffic on the intrastate trains had increased so that it exceeded that on the interstate trains—both as to number of trains and as to revenue.

As shown by the train schedule in evidence (Ex. C-91), there were then 101 trains operating each week day, divided as follows between interstate and intrastate traffic:

Interstate Traffic	Number of Trains		Per Cent of Total
Trains between Chicago and Milwaukee		48	47.5%
Intrastate Traffic			
Trains between Chicago and Terminal at Waukegan or Zion, Illinois	21		
Trains between Chicago and Terminal at Mundelein, Illinois	32	53	52.5%
Total		101	100.0%

The revenue for the 12-month period ending May 31, 1961 was divided between interstate and intrastate traffic (Ex. C-13), as follows:

	Amount	Per Cent of Total
Revenue from Illinois intrastate traffic	$2,923,126	62.38%
Revenue from Wisconsin intrastate traffic	351,199	7.49%
Revenue from interstate traffic	1,412,012	30.13%

2.

THE FREIGHT SERVICE.

The North Shore owns no freight cars. Its freight business consists of transporting cars of connecting railroads over parts of the North Shore's line to or from points on the North Shore's line or connecting lines. No freight is handled at the terminals of the North Shore in Chicago or in Milwaukee, or over its lines in either city.

The distribution of transportation revenues between

freight and passenger service for the years 1959 and 1960, and for the first seven months of 1961, is as follows:

	Passenger	Freight	Miscellaneous Revenue	Total Transportation Revenue	Percent Freight Revenue Bears to Total Transportation Revenue
For 1959 (Ex. C-1)	$4,507,685	$934,722	$253,008	$5,695,415	16.4%
For 1960 (Ex. C-3)	4,747,612	812,595	246,607	5,806,814	14.0%
For 1st 7 Mo. 1961 (Ex. C-5)	2,539,067	449,684	134,538	3,123,289	14.3%

As was said by this Court in holding that the North Shore's railroad was "an interurban electric railroad," notwithstanding the relatively minor freight traffic (then 22% as against 14% now) (*United States* v. *Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1, 10):

> "We thus have a typical example of an interurban electric line for passenger service which has developed, in addition, such freight traffic as could advantageously be conducted without interfering with performance of the main purpose of the carrier."

3.

THE QUESTION AS TO THE CONTROLLING EFFECT OF THE DECISION IN UNITED STATES *vs.* C. N. S. & M. R. Co., 288 U. S. 1,—"THE PRIOR NORTH SHORE CASE."

In *United States* v. *C. N. S. & M. R. Co.*, 288 U. S. 1 (herein referred to as "the prior North Shore case") the question involved was whether the North Shore was exempted from jurisdiction of the Interstate Commerce Commission under a provision in Paragraph (1) of Section 20a of the Interstate Commerce Act (relating to securities) excepting from the carriers subject to the juris-

diction of the Interstate Commerce Commission under that Section:

> "* * * a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation."

Except for substitution of the singular for the plural number, the exemption provision (Paragraph (1) of Section 20a, construed by this Court in the prior North Shore case) is thus identical with that in Paragraph (22) of Section 1 involved in the instant case. And, as the Court pointed out in distinguishing the decision in *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299 (which held the exemption in Paragraph (22) not applicable to a railroad whose business was predominantly the carriage of freight) the two exemptions are "couched in the same language" and hence should be given like interpretation when applied to the same railroad (288 U. S., at p. 10).

As appears from the quotation at page 12, above, the Court, in the prior North Shore case, held that the North Shore's railroad is "a typical example of an interurban electric line for passenger service"—the minor freight service being purely incidental.

And after a full review of the facts showing the character of the railroad (which do not differ from the facts now applicable), the Court stated that "as a matter of first impression" and irrespective of administrative construction, it was "inclined to hold" that the North Shore's railroad is within the exemption. As to this, the Court said (288 U. S. at pp. 10-11):

> "If the status of the appellee [the North Shore Railway] were a matter of first impression, we should, though the matter is not free from difficulty, be inclined to hold Section 20(a) inapplicable [*i.e.*, to hold

the North Shore Railway to be within the exemption]. But for the reasons about to be stated, we consider the question settled."

The Court then pointed out that the North Shore had repeatedly issued securities with the approval of the State Commission only and that the Interstate Commerce Commission had made no objection thereto and had apparently acquiesced in the assumption that the North Shore's railroad was within the clause exempting it from the Interstate Commerce Commission's jurisdiction. The Court held, therefore (288 U. S., at p. 13), that the administrative construction removed all doubt and sustained the conclusion, already reached "as a matter of first impression," that the North Shore was within the exemption clause in Paragraph 1 of Section 20a—identical with the exemption clause involved in the instant case.

In the report of the Interstate Commerce Commission here involved (as followed and affirmed by the court below in this case), the primary authority cited for disregarding the decision of the Supreme Court in the prior North Shore case (see Appendix, pp. xiii, xix-xxi, xxxi) is the two to one decision (290 ICC 765) of a three-man division of the Commission. In that proceeding (referred to herein as "the Shore Line case"), the division hearing the case authorized abandonment of the Shore Line branch of the North Shore's railroad, and held (contrary to the decision of the Supreme Court in the prior North Shore case) that the North Shore's railroad is not "an interurban electric railroad which is not part or parts of a general steam railroad system of transportation," within the provision in Paragraph (22) exempting such a railroad from the jurisdiction of the Commission.

In support of that conclusion, the Commission relied primarily on the decision in the *Piedmont & Northern Railway* case, 286 U. S. 299 holding that a railroad owning

287 freight cars and deriving 95% of its revenue from freight traffic is not within the exemption. The decision in that case is distinguished in the prior North Shore case (288 U. S., at p. 10) and held not to be applicable to the North Shore.

One of the Commissioners dissented from the decision in the Shore Line case, on the following stated ground (290 ICC at p. 798):

> "In view of the decision in *United States* v. *C. N. S. & M. R. Co.*, 288 U. S. 1, I would dismiss this application for want of jurisdiction."

There was no review by the full Commission or by a court, of the decision of the division in the Shore Line case, and it could hardly be held to overrule the Supreme Court.

The decision on the question of jurisdiction, and as to the facts relating thereto, is for the Court and not for the Commission. (*United States* v. *Idaho*, 298 U. S. 105, 109; and *Yonkers* v. *United States*, 320 U. S. 685, 689.)

In *In Re Chicago, North Shore & Milwaukee Railroad*, 131 Fed. 2d 458 (CCA, 7th Circuit; cert. den. 318 U. S. 768) the question was whether a provision in Section 77 of the Bankruptcy Act, exempting from the purview thereof "interurban electric railroads which are not part of a general steam railroad system of transportation," or which have less than one-half their business in freight, applied to the North Shore's railroad. The Court, following the decision of the Supreme Court in the prior North Shore case, held that the exemption provision did so apply, stating (131 Fed. 2d at p. 459):

> "* * * the Supreme Court in 1933 upheld the decision of the District Court that this road was 'an independently operated electric interurban railway expressly excepted from the requirements of the section [*i.e.*, Section 20a].' *United States* v. *Chicago, N. S. & M. R. Co.*, 288 U. S. 1, 53 S. Ct. 245, 246, 77 L. Ed. 583."

And then after distinguishing the earlier case of *Sprague* v. *Woll*, 122 Fed. (2) 128, which held the North Shore to be subject to the Railway Labor Act, and not to be within an exemption substantially different from that here involved, the Court continued as follows (131 Fed. 2d, at p. 160):

> "We think there can be no question but that this road is not 'operating as a part of a general steam railroad system of transportation.'"

It is the appellants' contention that the decision in the prior North Shore case (288 U. S. 1) is controlling, and that the Court erred in not following that decision in deciding the instant case, and in not holding that the North Shore's railroad is an interurban electric railroad exempted by Paragraph (22) of Section 1 of the Interstate Commerce Act from the jurisdiction of the Interstate Commerce Commission.

4.

THE QUESTION AS TO JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION OVER THE INTRASTATE SERVICE.

(a)

The Interstate Commission Has No Jurisdiction Over the Intrastate Traffic Where Its Continuance Can Cast No Undue Burden on Interstate Traffic.

Section 1 of the Interstate Commerce Act (Appendix p. xxxviii), provides as follows:

> "(2) The provisions of this chapter [*i.e.*, the Interstate Commerce Act] * * * shall not apply—
>
> (a) To the transportation of passengers or property * * * wholly within one state * * * except as otherwise provided in this chapter."

The exception noted applies only if an authorization to abandon intrastate traffic is necessary to relieve interstate traffic of an unfair burden.

In the instant case, if the jurisdiction of the Interstate Commerce Commission to authorize abandonment of North Shore's interstate traffic is upheld, the jurisdiction of the Interstate Commerce Commission over intrastate traffic cannot be sustained on the ground that intrastate traffic puts an undue burden on the interstate traffic of the North Shore, because the North Shore's interstate traffic will then be nonexistent.

See: *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204 (217-18).
Colorado v. *United States*, 271 U. S. 153 (169-170).

(b)

The Intrastate Traffic on the North Shore's Railroad Is Separate From and Not Integrated With the Interstate Traffic.

The assumption in the report of the Interstate Commerce Commission (Appendix, pp. xxiii to xxiv) and in the opinion of the District Court (Appendix, pp. xiii to xiv) that the interstate and intrastate business of the North Shore are somehow "co-mingled" and "integrated" and are not capable of practical "disjunction," are not supported by any substantial evidence.

The intrastate trains between Chicago and terminals at Waukegan or Zion, Illinois, and between Chicago and the terminal of the Mundelein branch at Mundelein, Illinois, are not part of any interstate system of transportation.

Mundelein is not on an interstate route.

The tracks to Waukegan and Zion are also used by interstate trains passing north to Milwaukee—but the separa-

tion of the intrastate traffic which is carried by separate intrastate trains listed in the tabulation at page 11, above, is not altered by the fact that there are other trains on the railroad that cross a state line.

As pointed out in the interim report of the Interstate Commerce Commission (Appendix, p. xxxi), at the time the North Shore filed with the Interstate Commission the application here involved, for leave to abandon its railroad, it also filed with the Illinois Commerce Commission a companion application asking for authority to abandon its railroad, insofar as that Commission had jurisdiction thereover.

Joint hearings were held before the Interstate and Illinois Commissions and the Illinois Commission denied the application filed before that Commission.

No steps were taken to review the decision of the Illinois Commission. If conditions have changed, so as to call for further consideration, an application may again be presented to the State authorities.

There is no basis for the assumption that intrastate traffic is not separate from the interstate traffic, and that it cannot be carried on independently under State regulation.

(c)

The Question Whether the Continuance of the Intrastate Traffic Will Cast an Undue Burden on the Interstate Commerce of the North Western and Milwaukee Railroads.

The report of the Interstate Commerce Commission (Appendix, pp. xxiv-xxv) and the opinion of the three-judge Circuit Court (Appendix, p. xiv and note 4), sustaining the jurisdiction of the Commission over the intrastate traffic, rest in large part on the assumption that the abandonment

of the intrastate service on the North Shore's railroad will benefit the intrastate suburban service of the Chicago & North Western and the Chicago, Milwaukee, St. Paul & Pacific Railroads, and by increasing their revenues will have a beneficial effect on their interstate service. The conclusion, apparently, is that continuance of the North Shore's intrastate service casts a burden on the interstate commerce of competitor roads and hence that the Interstate Commerce Commission has jurisdiction to authorize its abandonment and public convenience will be served thereby.

There is no evidence or finding to support that conclusion.

But even if the conclusion were correct, it furnishes no basis for the further assumption that public convenience would therefore be served by abandonment of the North Shore's intrastate service and the shifting of some or all of the passengers to the other two railroads.

The North Shore has been serving communities along its railroad north of Chicago for many years. It renders a distinct special service to the Loop District of Chicago and to outlying business districts to the north and south of the Loop—a service not rendered by either the North Western or the Milwaukee Railroads.

This is a local service—not an interstate service.

Despite higher fares, the North Shore has consistently had more patronage than either of the other railroads from competing stations.

The following comparison of passenger traffic for the year 1957 from points where the North Shore and the North Western or Milwaukee Railroads supposedly compete, shows the preponderance of the traffic on the North Shore, and the preference of the suburban passengers for the North Shore service (Exs. 85, 86, 87):

NUMBER OF PASSENGERS.

Station	North Shore	C&NW	CMStP&P	Percent Using North Shore
Mundelein	225,165	—	—	100%
Libertyville	215,264	—	90,402	70%
Sheridan Elms	39,799	—	6,659	86%
Zion	90,786	6,786	—	94%
Waukegan	440,329	136,385	—	76%
North Chicago	75,687	27,404	—	73%
Great Lakes Naval Training Station	291,619	1,498	—	99%

South of the above-listed stations, the North Western and Milwaukee Roads are several miles distant from the North Shore, and the percentages vary; but even if we consider as competing, the more distant but parallel service, the North Shore still has 51% of the total traffic in the area in which the North Western Railroad might be deemed to be a competitor, and 61% of the total traffic in the area in which the Milwaukee Railroad might be so considered.

Under those circumstances, it could hardly be argued that cutting off the much-used special service rendered by the North Shore would contribute to the public convenience. The figures indicate that public convenience and necessity, as measured by major patronage for many years, would be served best by maintenance of the North Shore's intrastate service.

But, again, since it is the intrastate service that is involved, we submit that this is a question for the State Commission, and not for the Interstate Commission.

5.

The Alleged Operating Losses.

The Interstate Commerce Commission found that the North Shore is suffering operating losses that could not be eliminated by improved operating methods and the fixing of adequate fares.

There is substantial evidence in the record (Ex. 112) to show that no real attempt was made to eliminate the losses; that a plan was formulated in 1954 (Ex. 112) to abandon the line after a lapse of 5 years, irrespective of profit or loss and thus to procure a $20,000,000 (or more) "tax shelter."

But the presence or absence of operating losses does not affect the determination of jurisdictional issues raised by the complaint in this suit. If the Interstate Commerce Commission has no jurisdiction, it cannot grant the relief asked.

There is no ground for an assumption that if relief is due, it cannot be obtained by appropriate action before the state authorities. In any event, Congress has elected to leave to those authorities the power to pass on the questions raised and to grant any relief that may be called for.

E.

THE QUESTIONS ARE SUBSTANTIAL.

1.

By Act of Congress, jurisdiction over abandonment procedure relating to "interurban electric railways" is taken from the Interstate Commerce Commission and left to the state regulatory commission, so long as the interurban electric railways involved are not "part or parts of a general steam railroad system of transportation."

This Court has held (in the prior North Shore case, 288 U. S. 1): (1) that the North Shore's railroad is an "interurban electric railway" and "not part of a general steam railroad system of transportation"; and (2) that its freight business (then 22%, now 14% of the total) is minor and incidental and does not alter the character of the railroad, and hence that it is within the exemption in Paragraph (1) of Section 20(a) of the Interstate Commerce Act, identical in wording with the exemption in Paragraph (22) of Section 1, here involved.

The decision of the three-judge District Court from which this appeal is taken, and the report and order of the Interstate Commerce Commission there reviewed, are in conflict with the decision of the Supreme Court in the prior North Shore case.

The North Shore's railroad is an electric railway extending over the 90-mile distance between Chicago and Milwaukee—with a branch line in the suburban area of Chicago to the west. The North Shore's railroad operates over city streets, both in Chicago and Milwaukee. It owns no freight cars and carries on a typical interurban and

suburban passenger business. It is an important mass transportation medium.

It is important, particularly in view of the prior decision of the Supreme Court, that a final determination be made by the Court as to whether or not the exemption (Paragraph (22) of Section 1) of interurban electric railways from jurisdiction of the Interstate Commerce Commission, applies to this railroad.

If the exemption is held to apply, then it follows that the decree appealed from must be reversed, and the question as to whether public convenience and necessity permit abandonment of this railroad must be left to the state regulatory commissions for decision.

2.

If it is held (contrary to appellant's contention) that the North Shore's railway is not an "interurban electric railway," exempted by Paragraph (22) of Section 1 of the Interstate Commerce Act from jurisdiction of the Interstate Commerce Commission so that the order authorizing abandonment of interstate commerce is valid, the interstate commerce will be abandoned and will no longer exist. It then becomes important to those served by the separate intrastate suburban service that a determination be made as to whether the Interstate Commerce Commission has jurisdiction to authorize abandonment of that service.

Jurisdiction over intrastate traffic, where no interstate traffic is involved or adversely affected thereby, is a matter wholly within the jurisdiction of the state regulatory bodies,

3.

Determination of the questions involved is of great importance to thousands of persons served by the North Shore's interstate and intrastate service, and to solution of the problems of mass transportation in the metropolitan areas affected.

We submit that the questions presented by these appeals are substantial, and of such serious import as to require plenary consideration with briefs on the merit and oral argument for their determination; and that probable jurisdiction should be noted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT.

Northern District of Illinois,

Eastern Division.

State of Illinois, Illinois Commerce Commission and North Shore Commuters Association, *Plaintiffs*, *vs.* United States of America, Interstate Commerce Commission, and Chicago, North Shore & Milwaukee Railway, *Defendants.*	Civil Action No. 62 C 1156

FINAL JUDGMENT AND DECREE.

(Entered December 10, 1962)

The above-entitled action having come on for hearing on November 7, 1962, before this Court, constituted as a three-judge district court under section 2284 of the Judicial Code, 28 U.S.C. § 2284, and this Court on December 5, 1962, entered its opinion dismissing the complaint and granting the counterclaim requested, it is hereby,

Ordered, Adjudged and Decreed that the relief prayed for in the complaint be denied, that the complaint be dismissed, and that the plaintiffs and each of them, their agents, employees and attorneys be enjoined by the decree of this court from in any manner interfering with the defendant's right to terminate its entire operations and dispose of its property all in accordance with and pursuant to the authority conferred by the certificate of the Interstate

Commerce Commission in its order and certificate issued May 10, 1962.*

Dated at Chicago, Illinois, this 10th day of December, 1962.

Luther M. Swygert
United States Circuit Judge

Julius H. Miner
United States District Judge

James B. Parsons
United States District Judge

---

*Note: The effective date of the Interstate Commerce Commission's order of May 10, 1962, was deferred pending reconsideration of the order. The order was later confirmed in the Commission's final order of October 15, 1962. See pages xxvi-xxvii *post*.

IN THE UNITED STATES DISTRICT COURT.
Northern District of Illinois,
Eastern Division.

State of Illinois, Illinois Commerce Commission, and North Shore Commuters Association, *Plaintiffs,* *vs.* United States of America, Interstate Commerce Commission, and Chicago, North Shore & Milwaukee Railway, *Defendants.*	Civil No. 62-C-1156

OPINION OF THE THREE-JUDGE DISTRICT COURT.

Filed December 5, 1962.

Before SWYGERT, *Circuit Judge*, MINER and PARSONS, *District Judges.*

Per Curiam.

The Interstate Commerce Commission has granted the Chicago, North Shore & Milwaukee Railway a certificate of public convenience and necessity permitting abandonment of its entire line of railroad extending between Milwaukee, Wisconsin, and Chicago, Illinois.[1]

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1. *Chicago, North Shore & Milwaukee Railway Abandonment of Entire Operation*, Finance Docket No. 20245, 312 I. C. C. 99; 317 I. C. C. 191, Report on Reconsideration, October 15, 1962 (not printed).

The State of Illinois, Illinois Commerce Commission, and North Shore Commuters Association, plaintiffs in this proceeding, have instituted this action to set aside and enjoin the Interstate Commerce Commission's order permitting abandonment.

On June 25, 1958, the North Shore applied to the Interstate Commerce Commission under Section 1(18-20) of the Interstate Commerce Act, 49 U.S.C. § 1(18-20), for a certificate of public convenience and necessity permitting abandonment. Motions to dismiss were filed challenging the jurisdiction of the Commission on the ground that the North Shore is exempt from Commission regulation under Section 1(22), 49 U.S.C. § 1(22), as an electric interurban railroad.

On May 4, 1960, the Interim Report of the Commission, 312 I.C.C. 99, was issued. The Commission determined that the motions to dismiss should be overruled because the North Shore is not a street, suburban, or interurban electric railway within the meaning of Section 1(22). The Commission, however, deferred action on the application for a period of one year to afford the North Shore, in cooperation with the regulatory commissions, the state and local authorities, and the public, an opportunity to explore all possibilities for profitable operation, including an immediate request by the North Shore for a necessary fare increase.

On May 10, 1962, the Report of the Commission After Further Hearing, 317 I.C.C. 191, was issued. The Commission concluded and found as follows:

> We conclude and find that the present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation; that abandonment of all operations is warranted, subject to the condition that applicant shall

sell the entire line, or any portion thereof, to any responsible person, firm or corporation offering, prior to the effective date of the certificate and order permitting abandonment, to purchase the same for continued operation (upon approval of this Commission) at a price not less than the net salvage value of the property sought to be acquired; that the imposition of conditions for the protection of employees adversely affected by the abandonment is not justified in the circumstances of this case; and that the inconvenience to users of applicant's service which will result from the abandonment will be mitigated by the availability of rail service provided by the Chicago & North Western Railway and the Chicago, Milwaukee, St. Paul and Pacific Railroad.

Subject to the condition mentioned, the Commission found that the present and future public convenience and necessity permit abandonment by the North Shore of its entire line of railroad, and issued an appropriate certificate and order to be effective 35 days from date of service. This effective date was subsequently extended pending disposition of various petitions for reconsideration.

On October 15, 1962, the Report of the Commission on Reconsideration, was issued. In that report, the Commission again considered and rejected the argument that the North Shore was an exempt interurban electric railway within the meaning of Section 1(22). The Commission also considered and rejected plaintiffs' argument that, even if the North Shore is subject to Commission jurisdiction, the Commission can only authorize abandonment as to interstate commerce.

In this proceeding plaintiffs challenge the action of the Interstate Commerce Commission in exercising federal authority by granting this abandonment certificate. They assert that the Commission has exceeded its jurisdiction. Primacy of state control is urged on the ground that the

North Shore is an interurban electric railroad exempted by Congress from national regulation. As an alternative, if the North Shore is found not to fall within this exemption, plaintiffs urge that federal authority is limited to abandonment of the North Shore's interstate operations.

It is apparent from the briefs and oral arguments of the opposing parties that this Court must resolve two jurisdictional questions. First, does the North Shore fall within the exemption of Section 1(22) of the Interstate Commerce Act, as being a "street, suburban, or interurban electric railway(s), . . . not operated as a part or parts of a general steam railroad system of transportation?" Second, assuming a negative answer to the first question, has Congress granted, and does the Interstate Commerce Commission have, authority to grant a certificate to the North Shore to abandon its entire operations in both intrastate and interstate commerce? We must dispose of these jurisdictional questions before considering the sufficiency of the evidence upon which the Commission granted a certificate of public convenience and necessity permitting abandonment.

For the reasons hereinafter set forth we hold that the North Shore is not within the exemption of Section 1(22) and that the authority of the Commission extends to all phases of operation—both intrastate and interstate—of the North Shore.

Plaintiffs claim that the character of the North Shore as being within the exception of Section 1(22) has been conclusively determined by the United States Supreme Court and therefore the Commission lacked authority to confer on it a status inconsistent with the Supreme Court's ruling.

The Supreme Court in *United States* v. *Chicago, North Shore and Milwaukee Railroad*, 288 U. S. 1 (1933), held that the North Shore fell within the exemption of Section

20a of the Interstate Commerce Act. Section 20a contains wording which is identical to that of Section 1(22). In examining the activities of the North Shore, the Court concluded:

> We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. The facts differentiate the case from *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*. . . . There the railroad was predominantly a carrier of interchange carload freight. . . . The purely local traffic in freight, passengers, baggage and express was there relatively inconsequential; but here greatly preponderates.

The Supreme Court was asked to conclude that the North Shore railroad had issued securities over a period of ten years in violation of Section 20, wherein such conclusions might have rendered these securities of no value. Throughout the period in which they were issued the Commission had never challenged the right or authority of the North Shore to issue these securities. That the Court's decision was influenced by an estoppel rationale based on the Railroad's reliance on past administrative rulings is evident:

> With this knowledge of the situation the Commission never, until it requested the attorney-general to institute the present suit, by word or act intimated that the procedure followed by the railroad was illegal or the state regulatory bodies without jurisdiction. It would be difficult indeed to conceive a clearer case of uniform administrative construction of § 20a as applied to this company. *Conceding that the proper classification of the railway is not free from difficulty,* all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons. . . . The primary responsibility rested upon the Commission to determine whether under the circumstances the

> railway was required to procure leave under § 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has for more than a decade resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation. (Emphasis supplied.)

In 1941, the Court of Appeals for the Seventh Circuit in *Sprague* v. *Wolf*, 122 F. 2d 128, cert. denied, 314 U. S. 669, interpreted a provision of the Railway Labor Act so as to conclude that the North Shore did not fall within the exemption of 45 U. S. C. § 451. The wording of that particular statute, although similar to the exception of Section 1(22) of the Interstate Commerce Act, specifically excludes from the exception "any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power." The Court, however, agreed with the Commission that the North Shore was both "not a street, interurban, or electric railway within the meaning of the exemption provisos" (in the three statutes being considered by the Commission) "*and* that it was a part of the general steam-railroad system of transportation." (at 130.)

In discussing the effect of the *North Shore* case, *supra*, the Court of Appeals distinguished the facts and concluded that the motivating reason for that decision was the reliance or estoppel considerations. It further stated at page 131:

> Under all the circumstances we are of the opinion that the holding of the Court did not bind the Commission as to subsequent determinations, and that the duty imposed upon the Commission by the Acts here involved was to be discharged in a proceeding de novo, and in accordance with all the evidence to be adduced in such proceeding.

In 1942, the Court of Appeals for the Seventh Circuit in *In re Chicago, North Shore and Milwaukee Railroad Company*, 131 F. 2d 458, was asked to interpret a section of the Bankruptcy Act in its application to the North Shore railroad. Section 77 of that Act applies to "Any common carrier . . . except a street, suburban or interurban electric railway which is not operated as *a* part of a general railroad system of transportation or *which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment.*" (Emphasis supplied.) The court concluded that the North Shore fell within the exception of Section 77, and even went so far as to say, "We think there can be no question but that this road is not 'operating as part of a general steam railroad system of transportation.'" The 50 per centum freight revenue requirement was accorded great weight in the court's final determination, as was the district court's right, under the Bankruptcy Act, to make an independent determination of the Railroad's status. This decision interpreted a statute which differs materially from the Interstate Commerce Act in both its underlying purpose and in its jurisdictional tests. For this reason the 1942 Court of Appeals' decision was not binding on the Commission in the proceeding which is now being reviewed.

It is apparent from the decisions following the Supreme Court *North Shore* case that exemptions similar to Section 1(22), but which are found in other provisions of the Interstate Commerce Act, or in other Acts, allow different interpretations, depending on the purpose of the Act, the underlying issues, and the particular facts of the case.

Upon holding that the Commission is not bound by the Supreme Court's determination in its classification of the North Shore, we must now decide the extent to which this court may review the jurisdictional classification made by

the Interstate Commerce Commission in the present application for abandonment.

In *U. S.* v. *Idaho*, 298 U. S. 105 (1936), the Supreme Court, in reviewing the findings of the district court which concluded that a branch of the Oregon Railroad was a "spur" under Section 1(22), held at page 109:

> The decree should be affirmed, because on findings amply supported by the evidence the trackage is a spur. Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. . . . Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a "spur" is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission.

The opinion by Justice Brandeis, while acknowledging that the district court had jurisdiction to determine the classification of the Oregon railroad, did not deny that the determination of the Commission should be given great weight. It merely concluded that the ultimate decision was left to the courts and not to the Commission.

In *City of Yonkers* v. *United States*, 320 U. S. 685 (1943), the Supreme Court was again called upon to review the findings of a district court in determining whether certain operations of the New York Central fell under the exception of Section 1(22). Although agreeing with Justice Brandeis that the determination of what is included within the exemption of Section 1(22) involves a "mixed question of fact and law," the Court nevertheless concluded that the Commission should first determine whether the railroad falls within its jurisdiction. In recognizing the importance

of the Commission's findings, the Court said at pages 691-692:

> It is hardly enough to say that the Commission's orders may be set aside by the courts where the Commission exceeds its authority. The Commission has a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards the appropriate line between the federal and state domains. . . . The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded. *It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.*
>
> • • • • •
>
> This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act. (Emphasis supplied.)

The case was remanded and the Commission held that it had jurisdiction after it had made detailed subordinate findings of fact. The district court affirmed, 56 F. Supp. 351, and on review the Supreme Court sustained, 323 U. S. 675 (1944). The Court stated at page 675:

> On remand of the case . . . to the Interstate Commerce Commission for further findings, the Commission reopened the case, took further evidence, and made additional findings. Upon examination of the case now here on appeal we conclude that those findings are sufficient to support the order, and the evidence is sufficient to support the findings. The judgment is affirmed.

We think these two Supreme Court opinions settle the question of the scope of judicial review so that we may conclude that although this Court is not bound by the determinations of the Commission and that the doctrine of "substantial evidence" is not specifically applicable, nevertheless great weight must be given to the determination of the Commission in an order such as this in which its special competence is clearly recognized.

In the instant abandonment proceeding, the Commission, in its Report On Reconsideration dated October 15, 1962, referred to its Interim Report of May 4, 1960, 312 I.C.C. 99, which in turn referred to the Commission's earlier decision in *Chicago, N.S. and M. Ry. Abandonment*, 290 I.C.C. 765 (1955), which authorized the abandonment of portions of the North Shore line. As stated by the Commission in its Report On Reconsideration, this 1955 decision contains a complete and comprehensive discussion of the jurisdictional facts relating to the North Shore. The Commission points out that these facts are at present essentially the same[2] and concludes that the North Shore does not fall within the exception contained in Section 1(22).

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2. "The physical characteristics of applicant remain essentially unchanged since our decision in *Chicago, N. S. & M. Ry. Abandonment, supra*. It continues to engage in the transportation of both passengers and property across the Wisconsin-Illinois State line. While it is principally a passenger carrier, we found in the cited decision (p. 769) that freight accounted for approximately 16.5 percent of its total operating revenues in 1953. The record herein discloses that in 1960 freight traffic accounted for about 14.6 percent of its total revenues. Practically all of the freight handled is interchanged with other railroads. Applicant's line is physically connected at six different points with one or more interstate carriers, namely the Elgin, Joliet & Eastern Railway, the Chicago, Milwaukee, St. Paul and Pacific Railway, the Minneapolis, St. Paul and Sault Ste. Marie Railroad, and the Chicago and North Western Railroad, and it continues to participate in more than 1,000 tariffs with class I trunk line carriers. We need not elaborate further. Other status-determining characteristics of applicant detailed in our decision cited above continue to be present."

Plaintiffs neither dispute the underlying facts set out in 290 I.C.C. 765, nor that those facts remain essentially unchanged. The only question before us then is whether these facts have been properly interpreted and whether they support the Commission's conclusion that the North Shore does not fall within the exception contained in Section 1(22). We think that the Commission has upon an abundance of evidence correctly determined that the North Shore does not fall within the exception and is therefore subject to Section 1(18) of the Act.

We now turn to plaintiffs' contention that even if the North Shore is an interstate carrier over which the Commission has jurisdiction, and even if the evidence justifies a certificate of public convenience and necessity permitting abandonment, it must be limited to the interstate operations of the carrier.

The Commission, in authorizing abandonment of the entire system of the railroad, based its decision upon two grounds: (1) the North Shore crosses a stateline; and (2) even if the North Shore's operations were confined to intrastate commerce, such restricted operations would constitute an undue burden upon interstate commerce.

The Commission has consistently asserted exclusive jurisdiction to authorize complete abandonment of a railroad line where the railroad operates such line in more than one state, *Tonopah & T.R. Co. Abandonment*, 236 I.C.C. 265; *Missouri & Ark. Ry. Co. Receivers Abandonment*, 271 I.C.C. 171.

Where a railroad physically crosses a state line and carries on both interstate and intrastate business over the same tracks in an integrated system of operation and where "the two services are inextricably intertwined" (*Colorado v. United States*, 271 U. S. 153, 164), the Commission's exclusive jurisdiction over the railroad's interstate opera-

tions includes its intrastate operations as well. This conclusion is supported by the legislative history of the Interstate Commerce Act.

We agree with the Commission's well supported findings that the systemwide operations of the North Shore are not capable of a practical disjunction and hence the railroad fits squarely within the above rule.[3]

The Commission in its Report on Reconsideration also found a burden on interstate commerce even if the North Shore were permitted to operate solely as to intrastate commerce.[4] We think these findings are supported by the evidence.

3. "Applicant's line physically crosses the State boundary between Wisconsin and Illinois and it operates in both States, handling passengers, baggage and freight in intrastate and interstate commerce. Interline tickets are sold for transportation to and from points on its system and because of its connections with other interstate railroads, as heretofore mentioned, it is able to participate in freight bridge traffic. Its intrastate and interstate operations are co-mingled and are being conducted as part of the same service. In finding that public convenience and necessity permit the abandonment, we necessarily considered the entire operation and the needs of the public for both interstate and intrastate service. As we stated in our prior report after further hearing, all of applicant's present revenues from both interstate and intrastate operations are not sufficient to maintain the facilities necessary to safety of operation. It is obvious that revenues from intrastate operations alone would be insufficient to permit continued safe operations."

4. "It was also shown in our last report that the Chicago & North Western Railway Company (North Western) serves the considered area between Milwaukee and Chicago, its tracks being located slightly west of and generally parallel to the main line of applicant. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) also operates in this area. Although it does not have comparable stations at all of the points served by the other two carriers, its line is located slightly east of the applicant's line, parallels it in part, and is separated by distances ranging from 0.25 mile to 2.4 miles. North Western has spent considerable sums for new cars and advertising to increase the patronage on its Milwaukee-Chicago trains. It sustained deficits amounting to approximately $2 million on these operations in

It is no longer open to doubt that where the operation of a railroad line, or a part of a line, vitally affects the revenues of an interstate carrier, the Commission may authorize abandonments not only of the interstate operations but also of the intrastate operations as well. *Colorado* v. *United States*, *supra*; *Transit Commission* v. *United States*, 284 U. S. 360 (1932). While not dealing with railroads, *Wickard* v. *Filburn*, 317 U. S. 111 (1942), a landmark case, makes this abundantly clear. There the Supreme Court quoted with approval the following language from *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119:

> The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of

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1958-1959, and, like applicant, has been faced with the problem of declining patronage.

"Each of the three railroads operating in this area are competitive for certain of their passengers moving in intrastate as well as interstate commerce. It is clear that the traffic is not sufficient to support all on a reasonably profitable basis. If applicant continues operations, either on the present basis or solely in intrastate commerce, it will carry passengers who otherwise would patronize the North Western or Milwaukee. Thus, the ability of those railroads to continue their present operations in interstate or foreign commerce should be improved by the proposed abandonment by applicant.

"It also is important to note that a certificate issued by us authorizing abandonment is permissive and, at applicant's election, the authority granted may or may not be exercised. If our certificate were limited to abandonment of operations in interstate and foreign commerce and the applicant were compelled by the States to continue intrastate operations over separate segments in Illinois and Wisconsin, the economics of the situation would dictate that applicant continue its interstate operations in order to minimize its losses. This would be so notwithstanding our finding that applicant's revenues are such as to make it difficult for a carrier to maintain its facilities in a manner that would insure safe operations. The likely result would be the safety of interstate as well as intrastate passengers would be endangered.

"We conclude that the continued operation of the applicant's line, even if confined to intrastate commerce, would constitute an undue burden upon interstate commerce."

> Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

Plaintiffs cite *Texas* v. *Eastern Texas Ry. Co.*, 258 U. S. 204 (1922), in support of the proposition that the Commission has no authority to affect the intrastate operations of the North Shore. This case is readily distinguishable. In *Eastern Texas* the court concluded that the railroad was entirely within a single state, was owned and operated by a corporation of that state, and was not a part of another line. It further concluded that interstate commerce would not be burdened or affected by its continued operation. In the case at bar, the North Shore operates in both Wisconsin and Illinois, and its intrastate and interstate operations cannot be separated realistically. Furthermore, the Commission found that the continued operation of any portion of the North Shore line would unreasonably burden interstate commerce.

There seems to be no contention by plaintiffs that the evidence is insufficient to justify the issuance of a certificate of public convenience and necessity authorizing abandonment if it is limited solely to interstate operations, provided their position with respect to Section 1(22) is held to be unsound. Indeed, we do not see how such a contention could very well be made in the face of the findings of fact upon which the certificate is based.

In its Report dated May 10, 1962, the Commission found that "the present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation. . . ." This conclusion is justified by the evidence. The outstanding single fact supporting this conclusion is that the North Shore for a thirty-year period covering the years 1932 through 1961 (except during the World War II years 1941-1946) has sustained large operating losses. The Commission found that if normal maintenance were included in the North Shore costs, it would result in deficits of $624,000 in 1959; $693,000 in 1960; and $762,000 for the year ending May 31, 1961. The actual operating deficits for the years 1955 to 1961 are set out below.[5]

Since we have determined that the Commission had jurisdiction to authorize abandonment of the intrastate as well as the interstate operation of the railroad, we now conclude that the evidence justified the issuance of the certificate.

Accordingly, the complaint herein is dismissed and the counterclaim requesting that the plaintiffs and each of them, their agents, employees and attorneys be enjoined by the decree of this court from in any manner interfering with the defendant's right to terminate its entire operations and dispose of its property all in accordance with and pursuant to the authority conferred by the certificate of the Interstate Commerce Commission in its order and certifi-

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5. "Year — Operating deficit
1955 ..... $661,874
1956 515,067
1957 603,413
1958 462,615
1959 398,835
1960 468,239
Ended May 31, 1961 .. 539,872"

cate issued May 10, 1962, is granted. A decree consistent herewith will be entered.

Luther M. Swygert
Luther M. Swygert, *Circuit Judge*
Julius H. Miner
Julius H. Miner, *District Judge*
James B. Parsons
James B. Parsons, *District Judge*

Service Date
Oct. 18, 1962

EXTRACT FROM REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION.

(Dated October 15, 1962.)

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATION.

Decided October 15, 1962.

Our prior report after further hearing of May 10, 1962, 317 I. C. C. 191 found, subject to a condition hereinafter described, that the present and future public convenience and necessity permit abandonment by the applicant Chicago, North Shore & Milwaukee Railway of its entire line of railroad in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill. The effective date of our certificate and order giving effect to those findings has been postponed pending disposition of petitions for reconsideration filed by protestants.

* * * * *

Petitioners question our jurisdiction to issue a certificate authorizing abandonment of applicant's line. First, they contend that applicant is an interurban electric railway not operated as a part of a general steam railroad system of transportation, within the purview of section 1(22) of the Interstate Commerce Act, and that, thus, abandonment of its lines is excluded from our jurisdiction.

In disposing of a similar contention that applicant is an electric interurban railway not operated as a part of a general railroad system of transportation, our interim report of May 4, 1960, 312 I. C. C. 99, referred to our earlier decision in *Chicago, N. S. & M. Ry. Abandonment*, 290 I. C.

C. 765, wherein the same question was presented. That decision contains a complete and comprehensive discussion of the applicable law and facts as related to the indicated contention, including a discussion of the cases relied upon by petitioners.

The physical characteristics of applicant remain essentially unchanged since our decision in *Chicago, N. S. & M. Ry. Abandonment, supra.* It continues to engage in the transportation of both passengers and property across the Wisconsin-Illinois State line. While it is principally a passenger carrier, we found in the cited decision (p. 769) that freight accounted for approximately 16.5 percent of its total operating revenues in 1953. The record herein discloses that in 1960 freight traffic accounted for about 14.6 percent of its total revenues. Practically all of the freight handled is interchanged with other railroads. Applicant's line is physically connected at six different points with one or more interstate carriers, namely the Elgin, Joliet & Eastern Railway, the Chicago, Milwaukee, St. Paul and Pacific Railway, the Minneapolis, St. Paul and Sault Ste. Marie Railroad, and the Chicago and North Western Railroad, and it continues to participate in more than 1,000 tariffs with class I trunk line carriers. We need not elaborate further. Other status-determining characteristics of applicant detailed in our decision cited above continue to be present. And, as we stated therein:

> From what has been said by this Commission and the courts in subsequent decisions, it also seems clear that the decision of the Supreme Court in *United States* v. *Chicago, N. S. & M. R. Co., supra,* holding the applicant's predecessor an interurban electric railway within the exemption clause of section 20a of the Interstate Commerce Act is not binding in this proceeding.

From the above, we conclude that applicant does not fall within the exemption contained in section 1(22) of the

Interstate Commerce Act, that it is subject to section 1(18) of that act, and that the application under consideration in this proceeding is a matter within our jurisdiction.

Petitioners also contend that, even if the applicant is subject to the provisions of section 1(18), we are without jurisdiction to authorize it to abandon intrastate service but are limited to authorizing abandonment as to interstate commerce, relying principally upon the decision of the United States Supreme Court in *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204. The facts in the cited case differ from those present here. There, the court referred to the fact that the railroad involved was located entirely within the State of Texas and was owned by a Texas corporation, and it found that the situation and ownership of the road were such that interstate and foreign commerce would not be burdened or affected by the continuance of intrastate business over the line.

In a later decision, *Colorado* v. *United States*, 271 U. S. 153, the court sustained our action in authorizing the total abandonment of a branch line, located wholly within Colorado, of a railroad whose system was located partly in Colorado and partly in other states. In referring to the fact that the railroad involved therein, like most other railroads, was chartered to engage in both intrastate and interstate commerce, the court made the following statement:

> The same instrumentality serves both [intrastate and interstate commerce]. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole.

After noting the statutory exemptions from federal control contained in section 1(22), in respect of spur, industrial,

team, switching and side tracks, the court stated that "as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment."

The Court further stated that while the constitutional basis to issue a certificate of abandonment is the power of Congress to regulate interstate commerce, the statute does not make the issuance of a certificate of abandonment conditional upon a specific finding that continued operation will result in discrimination against interstate commerce or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier. Under the statute, the sole test prescribed is that the abandonment be consistent with public convenience and necessity, and in its determination the "Commission must have regard to the needs of both intrastate and interstate commerce." In discussing this, the Court indicated that an application for abandonment rarely involves an actual conflict between the needs of interstate and intrastate commerce. But wherever such conflicting needs exist, "the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands." In that balancing, "the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the act does not make issuance of the certificate dependent upon a specific finding to that effect."

We consistently have construed the *Eastern Texas R. Co.* case, *supra*, to apply only to abandonments of an entire line of railroad located within one State and not operated

as a part of an interstate railway system.[3] In such class of cases, our certificates have authorized only abandonment of operations in interstate or foreign commerce. (*Grand River Valley R. Co. Abandonment*, 202 I. C. C. 359; *Nezperce & I. R. Co. Abandonment*, 257 I. C. C. 81). On the other hand, we consistently have asserted exclusive jurisdiction to authorize complete abandonment of a line of railroad in the following classes of cases: (1) Abandonment of a portion of a line of railroad by an applicant operating solely within a single State (*Abandonment by Detroit & Mackinac Ry. Co.*, 138 I. C. C. 576); (2) Abandonment of a line wholly within a State by a carrier which operates a railroad in more than one State or which is a part of a system operating in more than one State (*Chesterfield & L. R. Co. Receivers Abandonment*, 244 I. C. C. 20); and (3) abandonments, as in the instant case, involving a line operated in more than one State (*Tonopah & T. R. Co. Abandonment*, 236 I. C. C. 265; *Missouri & A. Ry. Co. Receivers Abandonment*, 271 I. C. C. 171).

Applicant's line physically crosses the State boundary between Wisconsin and Illinois and it operates in both States, handling passengers, baggage and freight in intrastate and interstate commerce. Interline tickets are sold for transportation to and from points on its system and because of its connections with other interstate railroads, as heretofore mentioned, it is able to participate in freight bridge traffic. Its intrastate and interstate operations are co-mingled and are being conducted as part of the same service. In finding that public convenience and necessity permit the abandonment, we necessarily considered the

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3. At first blush, the decision in *Jay Street Connecting R. R. Abandonment of Entire Line*, 307 I. C. C. 137, may seem inconsistent with the stated principle. However, in that case, although the railroad tracks involved were located solely within one State, the applicant's car float and lighterage operations extended into another state.

entire operation and the needs of the public for both interstate and intrastate service. As we stated in our prior report after further hearing, all of applicant's present revenues from both interstate and intrastate operations are not sufficient to maintain the facilities necessary to safety of operation. It is obvious that revenues from intrastate operations alone would be insufficient to permit continued safe operations.

It was also shown in our last report that the Chicago & North Western Railway Company (North Western) serves the considered area between Milwaukee and Chicago, its tracks being located slightly west of and generally parallel to the main line of applicant. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) also operates in this area. Although it does not have comparable stations at all of the points served by the other two carriers, its line is located slightly east of the applicant's line, parallels it in part, and is separated by distances ranging from 0.25 mile to 2.4 miles. North Western has spent considerable sums for new cars and advertising to increase the patronage on its Milwaukee-Chicago trains. It sustained deficits amounting to approximately $2 million on these operations in 1958-1959, and, like applicant, has been faced with the problem of declining patronage.

Each of the three railroads operating in this area are competitive for certain of their passengers moving in intrastate as well as interstate commerce. It is clear that the traffic is not sufficient to support all on a reasonably profitable basis. If applicant continues operations, either on the present basis or solely in intrastate commerce, it will carry passengers who otherwise would patronize the North Western or Milwaukee. Thus, the ability of those railroads to continue their present operations in interstate or foreign commerce should be improved by the proposed abandonment by applicant.

It also is important to note that a certificate issued by us authorizing abandonment is permissive and, at applicant's election, the authority granted may or may not be exercised. If our certificate were limited to abandonment of operations in interstate and foreign commerce and the applicant were compelled by the States to continue intrastate operations over separate segments in Illinois and Wisconsin, the economics of the situation would dictate that applicant continue its interstate operations in order to minimize its losses. This would be so notwithstanding our finding that applicant's revenues are such as to make it difficult for a carrier to maintain its facilities in a manner that would insure safe operations. The likely result would be the safety of interstate as well intrastate passengers would be endangered.

We conclude that the continued operation of the applicant's line, even if confined to intrastate commerce, would constitute an undue burden upon interstate commerce. However, as the Court pointed out in the *Colorado* case, the Commission's jurisdiction under section 1(18) of the act is not limited to operations in interstate commerce and to such intrastate operations as may be found to impose an undue burden on interstate commerce. 271 U. S. at 164. Section 1(18) is not limited to the abandonment of interstate operations but by its terms includes "all or any portion of a line of railroad" subject to Part I of the act. Furthermore, paragraph 20 of section 1 provides that from and after issuance of the certificate, the applicant may proceed to abandon "without securing approval other than such certificate." When the Commission finds that the public convenience and necessity permit the abandonment of an entire line of railroad located in more than one State, the States involved cannot frustrate that action by requiring a continuance of intrastate operations. While the existence of an undue burden on interstate commerce properly may be used to state or to justify a particular result,

it is not necessary for the Commission to find such a burden where, as here, regulation of the intrastate activities in question is a necessary and proper consequence of effective exercise of the power to regulate interstate commerce. Cf. *Colorado* v. *United States, supra.*

* * * * * * *

* * * we affirm our prior finding that the present and future public convenience and necessity permit abandonment by the Chicago, North Shore and Milwaukee Railway of its entire line of railroad in Milwaukee, Racine and Kenosha Counties, Wis., and Lake and Cook Counties, Ill.

An appropriate order will be entered.

COMMISSIONERS FREAS and HERRING concur in the result.

COMMISSIONER TUCKER did not participate.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 15th day of October, A. D. 1962.

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATIONS.

Further investigation of the matters and things herein involved having been made, and the Commission on the date hereof having made and filed its report on reconsideration, which report, the interim report of May 4, 1960, and the report after further hearing of May 10, 1962, are hereby made a part hereof:

It is ordered, That these proceedings be, and they are hereby, reopened for reconsideration on the present record;

It is further ordered, That the certificate and order herein of May 10, 1962, be, and it is hereby, modified to become effective 15 days from the date of service of this order, and to make the authorization for abandonment subject to the modified condition respecting sale of the property as set forth in the report accompanying this order; and

It is further ordered, That the petitions for reconsideration and motion for a special order, described in the report herewith be, and they are hereby, denied except to the extent granted above.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

EXTRACT FROM REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION.

(Dated May 10, 1962.)

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATION.

Decided May 10, 1962.

Reported 317 ICC 191.

Report of the Commission After Further Hearing.
Tuggle, Commissioner:

By our prior report of May 4, 1960, 312 ICC 99, we assumed jurisdiction under section 1 (18)-(20) of the act to consider the issues of public convenience and necessity presented by the application for abandonment, and concluded that action thereon should be deferred for a period of 1 year in order to obtain more conclusive facts bearing

on the ultimate issue. We took this action despite the continuing deficits sustained by applicant in recent years because we noted a lessening of the deficit trend in 1958, the latest period for which financial results of operations were shown in the prior report, and considered it might be eliminated by higher fares and reduced expenditures.

* * * * * *

CONCLUSION.

We conclude and find that the present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation; that abandonment of all operations is warranted, subject to the condition that applicant shall sell the entire line, or any portion thereof, to any responsible person, firm or corporation offering, prior to the effective date of the certificate and order permitting abandonment, to purchase the same for continued operation (upon approval of this Commission) at a price not less than the net salvage value of the property sought to be acquired; * * *

Subject to the condition stated, we find that the present and future public convenience and necessity permit the abandonment by the Chicago, North Shore & Milwaukee Railway of its entire line of railroad in Milwaukee, Racine and Kenosha Counties, Wis., and Lake and Cook Counties, Ill.

An appropriate certificate and order will be issued, effective 35 days from date of service. * * *

CERTIFICATE AND ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of May, A. D. 1962.

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATION.

* * * * * * *

Further investigation of the matters and things involved herein having been made, and the Commission, on the date hereof, having made and filed a report after further hearing containing its findings of fact and conclusions thereon, which report hereby referred to and made a part hereof:

It is hereby certified, That, in Finance Docket No. 20245, subject to the condition relating to the sale of the line, or any portion thereof, for operation as referred to in said report after further hearing, the present and future public convenience and necessity permit abandonment by Chicago, North Shore & Milwaukee Railroad of its entire line of railroad in Milwaukee, Racine and Kenosha Counties, Wis., and Lake and Cook Counties, Ill., described in the reports aforesaid;

It is ordered, That this certificate shall take effect and be in force from and after 35 days from the date of service thereof. * * *

* * * * * * *

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

EXTRACT FROM REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION.

(Dated May 4, 1960.)

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATION.

Decided May 4, 1960.
Reported 312 ICC 99.

INTERIM REPORT OF THE COMMISSION.

By the Commission:

The Chicago, North Shore and Milwaukee Railway, hereinafter sometimes referred to as the applicant or the North Shore, is an electric railroad subject to the provisions of part I of the Interstate Commerce Act. On June 25, 1958, the North Shore applied under section 1(18)-(20) of the act for a certificate of public convenience and necessity permitting abandonment, or abandonment of operations, of its entire line of railroad extending generally between Milwaukee, Wis., and Chicago, Ill.; between Lake Bluff and Mundelein, Ill.; and between North Chicago Junction and Elm Place, Highland Park, Ill.; a total distance of approximately 106.05 miles, in Milwaukee, Racine and Kenosha Counties, Wis., and Lake and Cook Counties, Ill. Except for a short segment in Milwaukee where applicant operates over a line of its wholly owned subsidiary, and between Howard Street and Roosevelt Road, Chicago, approximately 12.04 miles, where the applicant operates under trackage rights over the elevated line of the Chicago Transit Authority, all the mileage sought to be abandoned is on North Shore owned right-of-way.

Similar applications with respect to the abandonment of intrastate operations by the applicant were filed with the State Commissions of Wisconsin and Illinois. Numerous protests were filed against the North Shore's proposals by and on behalf of the cities and villages served by the applicant, commuter associations, industries, railway employees' organizations, and individual users of the applicant's service. Upon request, the application filed with the Illinois Commerce Commission and the one filed with us were the subject of a joint hearing. On November 24, 1959, the Illinois Commerce Commission denied the application filed with that authority.

• • • • •

At the outset we must determine the question of law interposed by two separate motions filed by protestants challenging our jurisdiction herein. The applicant contends that we have jurisdiction. The motions are identical in that each alleges the North Shore to be an electric suburban and interurban railway not operated as a part of a general railroad system of transportation, and therefore exempt from our jurisdiction pursuant to the provisions of paragraph 22 of section 1 of the act. The same contention was presented by protestants in *Chicago, N. S. & M. Ry. Abandonment,* 290 I. C. C. 765, wherein the applicant was permitted to abandon its so-called Shore Line route in Lake and Cook Counties. The cited case contains a complete and comprehensive discussion of the law applicable to the jurisdictional question, including the cases relied upon by protestants in support of their contention, which will not be restated here. We are convinced that a railroad, such as the North Shore, operating between Chicago and Milwaukee, is not a street suburban or interurban electric railway within the meaning of section 1(22).

• • • • •

In view of the considerations mentioned herein, we conclude that action on the application should be deferred for a period of one year to enable a determination of possible continued operation by the North Shore without loss. During this time, applicant, in addition to consideration of the possible economies noted herein, should in cooperation with regulatory bodies, its employees, State and local authorities, and the public, endeavor to further explore the possibility of reducing operating expenses. Any fare increase that may be granted must be accepted and applied pending our final determination herein.

An appropriate order will be entered.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of May, A. D. 1960.

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATION.

Investigation of the matters and things involved in this proceeding having been made, hearings having been held and said Commission, on the date hereof, having made and filed an interim report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That action in this proceeding be, and it is hereby deferred for a period of one year from the date

hereof, during which time applicant in cooperation with regulatory bodies, State and local authorities, and the public, should endeavor to reduce operating expenses where such possibilities exist, and make an effort to obtain immediate fare increases designed as nearly as possible to produce, on the basis of past experience, revenues sufficient to meet the cost of operation plus a reasonable profit; it being understood that any fare increase granted is to be acepted and applied pending our final determination herein;

It is further ordered, That at the end of the year's deferment hereinabove mentioned, the matter may be brought to our attention for such other or further order as may be deemed appropriate under the circumstances then existing.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

EXTRACTS FROM NOTICE OF APPEAL BY NORTH SHORE COMMUTERS ASSOCIATION TO THE SUPREME COURT OF THE UNITED STATES.

Filed December 21, 1962.

I.

Notice is given, that North Shore Commuters Association, an Illinois corporation, and one of the Plaintiffs in this action, appeals to the Supreme Court of the United States from the final judgment and decree entered herein on December 10, 1962, by a specially constituted three-judge court, denying the relief prayed in the complaint, dismissing the complaint, and enjoining Plaintiffs "from in any manner interfering with the Defendant's [*i.e.*,

Chicago, North Shore and Milwaukee Railway's] right to terminate its entire operations and dispose of its property, all in accordance with and pursuant to the Authority conferred by the certificate of the Interstate Commerce Commission issued May 10, 1962."

This appeal is taken pursuant to Sections 1253 and 2101(b) of Title 28 United States Code.

III.

By the final judgment and decree from which this appeal is taken, the three-judge court sustained the jurisdiction of the Interstate Commerce Commission to enter its order of May 10, 1962, and subsequent order of October 15, 1962, permitting abandonment by Chicago, North Shore & Milwaukee Railway (referred to here as "the North Shore") of its entire railroad, including both the part thereof devoted to interstate commerce and the part devoted wholly to intrastate commerce.

The questions raised by the appeal are:

1. Whether the three-judge court erred:

   (a) In not holding that the North Shore's railroad is an interurban electric railway not operated as a part or parts of a general steam railroad system of transportation, and hence excluded by Paragraph (22) of Section 1, Title 49 USC, from the jurisdiction of the Interstate Commerce Commission to authorize its abandonment, in whole or in part; and

   (b) In sustaining the jurisdiction of the Interstate Commerce Commission to enter the order authorizing abandonment of the North Shore's railroad or any part thereof, and in not enjoining enforcement of that order.

2. Whether (if it is held, contrary to this Plaintiff's contention, that the North Shore's railroad is not within the exclusion provision of Paragraph (22) of Section 1, Title 49 USC) the three-judge court erred:

(a) In not holding that the Interstate Commerce Commission has no jurisdiction to authorize abandonment of that part of the North Shore's railroad which is devoted entirely to intrastate operations that do not and can not affect interstate commerce; and

(b) In sustaining the jurisdiction of the Interstate Commerce Commission to enter the order authorizing abandonment of the entire railroad, including that part devoted wholly to intrastate operation, and in not enjoining enforcement of that order insofar as it applies to such intrastate operation.

S. Ashley Guthrie,
Tenney, Sherman, Bentley & Guthrie,
Attorneys for Plaintiff,
North Shore Commuters Association.

ORDER EXTENDING TIME TO FILE RECORD.

(Entered February 6, 1963.)

* * * * *

2. The time for Plaintiff, North Shore Commuters Association to file the record and docket the appeal in this case in the Supreme Court of the United States is extended to and including March 19, 1963.

Enter:

James B. Parsons,
Judge.

EXTRACT FROM NOTICE OF APPEAL BY STATE OF ILLINOIS AND ILLINOIS COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES.

Filed February 7, 1963.

I.

Notice is hereby given that the State of Illinois and the Illinois Commerce Commission, some of the parties plaintiff herein, appeal to the Supreme Court of the United States from the Final Judgment and Decree, entered herein on December 10, 1962 by a special three-judge U. S. District Court, denying the relief prayed in the complaint, dismissing the complaint and enjoining Plaintiffs from interfering with the right of Defendant, Chicago, North Shore & Milwaukee Railway Company (hereinafter North Shore) to terminate its entire operation and dispose of its property in accordance with and pursuant to the authority conferred on it by the order and certificate of the Interstate Commerce Commission issued May 10, 1962.

By said Final Judgment and Decree the special District Court sustained the jurisdiction of the Interstate Commerce Commission, acting pursuant to Section 1, Paragraphs (18) to (20) inclusive, Title 49, U. S. Code, to permit Defendant, North Shore, to abandon its entire line of railroad including the part thereof devoted wholly to Illinois intrastate commerce.

II.

This appeal is taken pursuant to Sections 1253 and 2101(b), Title 28 U. S. Code.

• • • • • •

IV.

The following questions are presented by this appeal:

1. Whether the Special District Court erred in holding that Defendant, North Shore, is not a street, suburban or interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation and, therefore, is not excluded, by Paragraph (22) of Section 1, Title 49 U. S. Code, from the jurisdiction of the Interstate Commerce Commission to authorize its abandonment.

2. Whether, assuming *arguendo* the North Shore is not within the exclusion of Section 1, Paragraph (22), Title 49, U. S. Code, the Interstate Commerce Commission, nevertheless, has jurisdiction to authorize abandonment of that part of the North Shore's railroad which is wholly devoted to Illinois intrastate commerce.

STATE OF ILLINOIS,
ILLINOIS COMMERCE COMMISSION,
By /s/ WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 N. LaSalle Street,
Chicago 1, Illinois.

EDWARD V. HANRAHAN,
Special Assistant Attorney General;
Of Counsel.

STATUTES.

Extracts From Interstate Commerce Act

Title 49, United States Code.

Section 1, Title 49 USC:

"Carriers Subject To Regulation.

(1) The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water * * *.

From one State or Territory of the United States, or the District of Columbia to any other State or Territory of the United States, or the District of Columbia * * *.

Transportation Subject To Regulation.

(2) The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only insofar as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this chapter; * * *."

Section 1, Paragraph (18)—Title 49 USC:

"(18) * * * no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commis-

sion a certificate that the present or future public convenience and necessity permit of such abandonment. * * *"

Section 1, Paragraph (20)—Title 49 USC:

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, * * *. From and after issuance of such certificate, and not before, the carrier by railroad may * * * proceed with * * * the abandonment covered thereby. Any * * * abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

Section 1, Paragraph (22)—Title 49 USC:

"(22) The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

EXTRACTS FROM THE JUDICIAL CODE

TITLE 28.

Section 1253—Title 28 USC:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court for an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Section 1336—Title 28 USC:

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Section 2325—Title 28 USC:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

FILED
APR 5 1963

No. 937

In the Supreme Court of the United States

OCTOBER TERM, 1962

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION AND NORTH SHORE COMMUTERS ASSOCIATION, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO NORTH SHORE AND MILWAUKEE RAILWAY, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM OF CHICAGO NORTH SHORE AND MILWAUKEE RAILWAY, APPELLEE

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APPENDIX

May 4, 1960 — *Interim Report of Interstate Commerce Commission.*

May 10, 1962 — *Report of Interstate Commerce Commission After Further Hearing.*

October 15, 1962 — *Report of Interstate Commerce Commission On Reconsideration.*

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 937

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION AND NORTH SHORE COMMUTERS ASSOCIATION, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO NORTH SHORE AND MILWAUKEE RAILWAY, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM OF CHICAGO NORTH SHORE AND MILWAUKEE RAILWAY, APPELLEE

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Appellee, Chicago North Shore and Milwaukee Railway moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment and decree of a three-judge district court dismissing a complaint which sought to enjoin and set aside the enforcement of an order of the Interstate Commerce Commission issued May 10, 1962 and served May 18, 1962 and as reaffirmed by subsequent order of said Commission on October 15, 1962. Pursuant to the statutory authority conferred on the Interstate Commerce Commission by virtue of paragraphs (18), (19), (20) of §1 of the Interstate Commerce Act, and after proceedings extending for more than four years, the Commission granted to the Appellee a certificate of public convenience and necessity, authorizing the Appellee to abandon the operation of its entire line of railroad operated

between terminals in Milwaukee, Wisconsin and Chicago, Illinois, and located in Milwaukee, Racine and Kenosha Counties, Wisconsin and in Lake and Cook Counties, Illinois. The certificate was made subject to a condition, imposed by the Commission, requiring the Appellee to sell the line, or any part thereof, to anyone willing, prior to the effective date of the Commission's order, to purchase the same for further operation at its fair net salvage value. No offer to purchase, complying with the Commission's order, was ever made. No temporary restraining order or temporary injunction was sought by Appellants or issued by the district court. The decree of the district court dismissing the complaint was entered December 10, 1962. Appellee terminated its operations January 21, 1963.

Statutory Authority:—Paragraphs (18), (19) and (20) of § 1 of the Interstate Commerce Act (the texts whereof are set out in the page margin*) provide that no interstate

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* §1, par. (18) *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment (Title 49—USCA—Transportation p. 1).

§1, par. (19) *Application for certificate of commission; notice and hearing.* The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings.

railroad may abandon its line of railroad until a certificate of public convenience and necessity has been obtained from the Interstate Commerce Commission. The Act also provides that after the issuance of the certificate no further approval

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Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates (Title 49—USCA—Transportation p. 1).

§1, par. (20) *Issuance of certificate by commission; unlawful extension or abandonment of lines.* The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both (Title 49—USCA—Transportation p. 1).

other than such certificate is required and the carrier may retire from business.

Prior Decisions of This Court—The jurisdiction of the Interstate Commerce Commission with respect to the issuance of certificates of public convenience and necessity authorizing the abandonment of interstate carriers and the manner in which such jurisdiction shall be exercised, has been considered and decided by this Court in several decisions and may no longer be fairly considered as open to debate. These decisions are: *Colorado* v. *United States*, 271 U.S. 153; *Transit Commission* v. *United States*, 284 U.S. 360; and *City of Yonkers* v. *United States*, 320 U.S. 685; *City of Yonkers* v. *United States*, 323 U.S. 675. The decisions in the *Colorado* and *Transit Commission* cases decided that the Commission's authority to issue such certificates derived from the power of Congress to regulate interstate commerce; that such certificates issued as an incident to such regulation; that the power of the Congress over interstate commerce was plenary and exclusive; that even where the segments of road the operation of which were sought to be abandoned lay entirely within the territorial limits of a single state the Commission was authorized to issue such a certificate to an interstate railroad after balancing the respective interests and determining what fairness to all concerned required. The decisions in the *Yonkers* cases are particularly applicable to this appeal. The first *Yonkers* case decided that whether or not a given railroad is exempted from the Act involves a mixed question of fact and law in which it is essential that the basic jurisdictional findings with respect to the character of railroad involved should be first made by the Interstate Commerce Commission as an aid to the court since the Commission "has a special competence to deal with the transportation problems which are reflected in these questions" (320 U.S. 685, 691). That case was remanded for further findings. Such further find-

ings being made by the Commission, on the second appeal this Court concluded that the findings were sufficient to support the order and the evidence sufficient to support the findings. (323 U.S. 675) The Commission has made such findings in the case at bar. For convenience of the reader an appendix to this motion contains the reports of the Commission with respect to this case.

The Facts—Appellee operated a commercial interstate railroad, double tracked and built to standard railroad specifications, over a total of 107 miles in the southern part of Wisconsin and northern part of Illinois. The northern terminal of the railroad was located at Milwaukee, Wisconsin; the southern terminal at Chicago, Illinois. The railroad carried both passengers and freight in interstate commerce across the state line between the states of Wisconsin and Illinois. Though passenger traffic revenue predominated, Appellee's rail system was physically connected at six different points in Wisconsin and Illinois with the railroad tracks of four other interstate railroads for the transportation of freight moving in interstate commerce. The tributary territory through which the Appellee operated is also served by two other interstate railroads, i.e., The Milwaukee Road and The North Western, operating adjacent to Appellee, by an interstate motor bus carrier, The Greyhound Corporation, and by many local bus lines and highways. The railroad had been regulated in one way or another as an interstate carrier by the Interstate Commerce Commission ever since the Transportation Act of 1920. Other relevant features of the railroad are briefly mentioned in the Argument *post* pages 10 to 12.

The railroad operated by Appellee has sustained annually large and substantial financial losses extending back many years. Every year during the 27-year period embraced by the years 1932-1958 the railroad sustained large and substantial annual losses — except during the years of World

War II when the use of the automobile was curtailed. For fourteen years (1932-1946) the railroad was in the custody of and operated by receivers—and later trustees—for the district court at Chicago. The property was reorganized in late 1946 and discharged from the district court. Under a Plan of Reorganization the railroad was turned over to the mortgage bond holders for operation. Unsecured claims aggregating in excess of $7,000,000 and the stockholders' equity were entirely wiped out. Patronage on the railroad continued to decline. Financial losses continued to occur, notwithstanding the abandonment of a branch route which was authorized by the Interstate Commerce Commission on May 19, 1955. (*In Re Chicago North Shore and Milwaukee Railway Abandonment*, 290 ICC 765.) Particular attention is directed to pages 771-780 of that report of the Commission.

On June 25, 1958 Appellee made application to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing it to entirely retire from business. The application was opposed by labor organizations representing Appellee's employees, some municipalities, by various persons, firms and corporations in Wisconsin and Illinois, by the Public Service Commission of Wisconsin and by Appellants. Hearings were conducted by an Examiner. The Examiner recommended that the application be granted subject to a condition (usually imposed by the Commission) requiring sale of the property at its fair net salvage value to any responsible agency willing to continue further operation. Exceptions were filed to the Examiner's Report. Thereafter oral argument was heard by the full Commission. The Commission then entered an interim report (1) overruling objections to the jurisdiction of the Commission and holding Appellee to be a commercial interstate railroad and (2) requiring Appellee to try out an increase in its passenger fares, which, it was

insisted by Appellants, would solve Appellee's difficulties, and (3) to continue in operation for the trial period of one year (312 ICC 99). But Appellee's financial condition continued to greatly worsen. The Commission held further hearings in 1961. A further lengthy supplemental record was compiled. Every conceivable aspect of Appellee's operation was thoroughly and fully inquired into. Altogether the record in this case consists of over 3100 pages of testimony and some 207 exhibits. The full Commission again heard the parties at oral argument. On May 10, 1962 the Commission entered an order authorizing the issuance of a certificate. Appellants filed a petition for reconsideration. Upon reconsideration the findings of the prior report were supplemented and affirmed. The certificate was modified to provide for a method of arbitrating the fair net salvage value in the event a proper offer to purchase were made in apt time (317 ICC 191).

On June 11, 1962 Appellants filed a bill of complaint in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to enjoin and set aside the Commission's order of May 10, 1962. The complaint was later amended and supplemented and answers filed. The case was then heard by a three-judge court, which entered the decree appealed from.

ARGUMENT

This case presents no substantial question warranting plenary consideration by the Court.

The power of the Congress to regulate interstate commerce and its instrumentalities is too well settled to need more than mention. Paragraphs (18), (19) and (20) of §1 of the Interstate Commerce Act, under the authority of which the certificate issued in this case, were enacted as part of the Transportation Act of 1920. That Act was enacted by the Congress following World War I in order

to bring to a close the wartime period of federal operation of the railroads and to vest in the Interstate Commerce Commission the statutory power and duty to foster and develop the national system of transportation by railroad by placing in the hands of the Commission, *inter alia*, the jurisdiction to control the extension and abandonment of the lines of interstate carriers. The decisions of this Court in the *Colorado, Transit Commission* and *Yonkers* cases, all of which have been rigidly adhered to by the Commission in this case, mark out the nature of the function of the Commission with respect to the issuance of certificates authorized by the Act. Earlier — and independent of any statutory enactments — this Court in the cases of *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396, 399 and *Railroad Commission* v. *Eastern Texas Railroad Co.*, 264 U.S. 79, 85, had decided that a railroad could not, under the Fourteenth Amendment, be compelled by a State to continue the operation of its railroad at a loss; that when it develops with reasonable certainty that future operation of the railroad must be at a loss "the company may discontinue operation and get what it can out of the property by dismantling the road" (264 U.S. 79, 85).

The Appellee was and is an interstate commercial railroad and not a street, suburban, or interurban electric railway, exempted from the abandonment provisions of the Act. The specific finding of the Commission, both in 1955 (when it authorized Appellee to abandon a branch route located within the State of Illinois) and in this case, to the effect that the Appellee is such commercial railroad subject to the Interstate Commerce Act and to the jurisdiction of the Commission in the matter of abandonment, is fully and amply supported by the evidence. It is also consistent with the Commission's previous decisions with respect to the Appellee going back more than 35 years and pertaining to a variety of matters, such as (1) inspection of equipment,

(2) employees' railroad retirement benefits, (3) employee-employer relationship under the Railway Labor Act, and (4) unemployment insurance.

In 1927, in connection with deciding whether equipment used by the Appellee subjected Appellee to the jurisdiction and inspection requirements of the Interstate Commerce Commission, the Commission examined into the facts and decided that the railroad was subject to its jurisdiction and was not a street, suburban or interurban electric railway. *Rules For Testing Other Than Steam Locomotives,* 122 ICC 414, 438-439.

In 1937, the Commission was required to decide whether the Appellee was a railroad subject to the Railway Labor Act, the Railroad Retirement Act of 1937, and to the National Railroad Unemployment Insurance Act. After extensive hearings the Commission again decided (July 1939) that the Appellee was a commercial interstate railroad and not a street, suburban or interurban electric railway. (*Chicago North Shore and Milwaukee Railroad Co., Railway Labor Docket,* 234 ICC 13). Relying on the decision of this Court in *United States* v. *Chicago North Shore and Milwaukee Railroad Co.,* 288 U.S. 1, (and now relied on by Appellants), the railroad appealed from the findings of the Commission. The Commission's decision was affirmed by the Seventh Circuit Court of Appeals, *Sprague, Receiver* v. *Woll,* 122 F. 2d 128. This Court denied certiorari (314 U.S. 669). Since such decision, therefore, the employees of the railroad have been protected by the provisions of the Railroad Retirement Act, the Railway Labor Act and the Railroad Unemployment Insurance Act and, on the abandonment of the railroad, are now entitled to unemployment compensation benefits under said Railroad Unemployment Insurance Act and to retirement benefits under said Railroad Retirement Act. The employee organizations representing the employees who had participated in the hearings before the

Interstate Commerce Commission did not join in the court proceedings leading to this appeal. Neither did the Public Service Commission of Wisconsin. Nor did they question the jurisdiction of the Interstate Commerce Commission to hear and determine the application for abandonment.

In 1954, in an endeavor to reduce its operating losses, Appellee applied to the Interstate Commerce Commission for permission to abandon operations of a branch route located entirely within the State of Illinois and known as the "Shore Line Route." Protests were filed by employees and by cities and villages on the line sought to be abandoned. Jurisdiction of the Interstate Commerce Commission to hear and determine that application was challenged by some of the parties but not by the labor organizations, on the ground that the railroad was a street, suburban or interurban electric railway. Again the Interstate Commerce Commission, acting in compliance with the directions of this Court as contained in the opinion in the case of *City of Yonkers* v. *United States*, 320 U.S. 685, reexamined and reconsidered all of the physical characteristics appertaining to Appellee's railroad and decided that the Appellee was a commercial railroad and was not an interurban exempted from the abandonment provisions of the Interstate Commerce Act. Appellant, Illinois Commerce Commission did not at that time protest such finding. (See: *Chicago North Shore and Milwaukee Railway Abandonment*, 290 ICC 765).

The respective findings of the Commission are amply supported by the evidence. We have previously referred to the fact that Appellee operated trains in interstate commerce across the State lines of Wisconsin and Illinois. Such an operation across State lines is not essentially different than the similar operations of the New York Central, Pennsylvania Railroad, and Santa Fe, whose interstate character would be readily conceded. Appellants refer to two "distinct

passenger services" (J.S. p. 9). This was not the case. Practically every inch of Appellee's line of railroad was used in interstate commerce and in the transportation of interstate freight or interstate passengers. Some trains operated by Appellee did not cross the state line and served only stations in Illinois. However, the operation of these trains was intermingled with the operation of the interstate trains. The two services were inextricably intertwined. All trains used the interstate facilities of the railroad. There were no separate books of account. Appellee did not have, as the jurisdictional statement seems to imply, a separate plant for intrastate service. Appellee's evidence showing that a wholly intrastate operation in Illinois could only result in staggering losses was uncontradicted by any evidence.

There are many other items of evidence entering into and supporting the findings of the Commission. Appellee's line of railroad, located largely on private right-of-way, is double-tracked, of standard railroad gauge and constructed subject to standard Class I railroad clearance requirements. The principal route, the Skokie Valley Route, is laid with 100 pound rail and some 115 pound rail on crushed stone ballast suitable for and used for the operation of standard railroad freight cars. For carrying the electric power cables there was a so-called overhead catenary distribution system on expanded steel towers located at about 250 foot centers. Appellee operated a modern block signal system automatically controlled except for one short segment. About 85% of the grade crossings were protected by track circuit controlled standard automatic crossing protection devices used on railroads generally. Appellee's rail system was physically connected at six different locations with the rails of four other so-called steam or Class I railroads for the interchange of freight cars moving in interstate commerce. Appellee owns electric locomotives. By coupling such loco-

motives as many as 50-60 freight cars can be hauled in one train. Appellee operated high-speed interstate passenger trains called "Electroliners" daily between Milwaukee and Chicago terminals. At stations on its line Appellee sold "through" railroad and Pullman tickets to any place in the United States, Canada and Mexico. Appellee participated in more than 1000 tariffs with other interstate railroads, including all Class I trunk line railroads. It was a member of the Western Passenger Association, the Illinois Freight Association and the Western Trunk Line Association. All of the facts and circumstances taken together amply support the findings of the Commission that the Appellee was a commercial railroad subject to Part I of the Interstate Commerce Act and to the jurisdiction of the Interstate Commerce Commission and was not exempted from the abandonment provisions of the Act as contended for by Appellants.

Appellants emphasize the 1933 decision of this Court in the case of *United States* v. *Chicago North Shore and Milwaukee Railroad Co.*, 288 U.S. 1 — a case which did not involve abandonment. The decision in that case affirmed the dismissal of a complaint that had been filed by the United States seeking, in effect, to void approximately $38,000,000 of bonds of a corporate predecessor which were then outstanding in the hands of the public because the issuance thereof had not been specifically approved by the Interstate Commerce Commission prior to issuance. The decision of this Court was there based largely, if not wholly, on equitable principles. The issuance of the outstanding securities while not specifically approved by the Commission, had been made known to the Commission in annual reports to the Commission for many years; in addition there had been some earlier misunderstanding with respect to the necessity for such approval. This Court held in effect that even though the question as to the proper classifica-

tion of the railroad was not free from difficulty, that under the circumstances then prevailing in that case, the United States was equitably estopped to insist on a classification which would have voided a large amount of outstanding bonds. See decisions in *Sprague, Receiver* v. *Woll*, 122 F. 2d 128, 131; *Texas Electric Ry. Co.* v. *Eastus*, 25 F. Supp. 825, 832-833. Subsequent to that 1933 decision, the Appellee railroad placed its Electroliner trains in operation in 1942. The decision in the Railroad Retirement, Railroad Unemployment Insurance and Railway Labor Act case was rendered by the Interstate Commerce Commission in 1939 and upheld by the courts, including this Court, in 1941. The decision in the securities case therefore has been held by the courts to be not conclusive as to regulatory matters arising before the Commission subsequent thereto.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

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INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 20945

CHICAGO NORTH SHORE & MILWAUKEE RAILWAY ABANDONMENT OF ENTIRE OPERATION

Decided May 4, 1960

Action deferred for trial period of 1 year to afford the Chicago North Shore and Milwaukee Railway, in cooperation with regulatory commissions, State and local authorities, and the public, an opportunity to explore all possibilities for profitable operation, including an immediate request by the carrier for necessary fare increase.

James J. Magner, Charles D. Mahaffie, and *Frederick E. Stout* for applicant.

Harry R. Begley and *Ellis A. Ballard* for the Illinois Commerce Commission, protestant.

William E. Torkelson, A. Wilford Larson, John W. Reynolds, and *Beatrice Lampert* for the State and Public Service Commission of Wisconsin, protestants.

William G. Mahoney, Richard R. Lyman, Joseph A. Robie, P. G. Ward, Clyde M. Betts, G. P. Sheahan, Clint Bush, John F. McClain, Clyde Thompson, B. N. Kinkead, R. C. Williamson, W. E. McDenough, Maynard C. Groat, Thomas Duggan and *Justus R. Moll* for railway labor organizations, protestants.

S. Ashley Guthrie, Francis D. Fisher, Charles K. Bobinette, Robert N. Burchmore, Robert McClory, Thaddeus S. Snell, G. P. Sletteland, John E. Baker, Jr., John C. Melaniphy, Edward J. Kelly, Gerald E. Franzen, Walter J. Mattison, Harry G. Slater, Thomas D. Ahern, Thomas P. Corbett, Fred W. Wheeler, Bryon Matthews, Willis A. Overholtzer, Captain H. S. Harris, U.S.N., B. L. Polak, Robert J. Downing, Murray R. Counselman, Robert Sabonjian, William A. Angus, Thomas H. Compere, Mrs. Martha J. Haskell, Robert V. Baker, K. Thomas Savage, John B. Moser, and *Elroy C. Sandquist* for other protestants.

INTERIM REPORT OF THE COMMISSION

BY THE COMMISSION:

The Chicago North Shore and Milwaukee Railway, hereinafter sometimes referred to as the applicant or the North Shore, is an electric railroad subject to the provisions of part I of the Interstate Commerce Act. On June 25, 1958, the North Shore applied under section 1(18)-(20) of the act for a certificate of public convenience

and necessity permitting abandonment, or abandonment of operations, of its entire line of railroad extending generally between Milwaukee, Wis., and Chicago, Ill.; between Lake Bluff and Mundelein, Ill.; and between North Chicago Junction and Elm Place, Highland Park, Ill.; a total distance of approximately 106.05 miles, in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill. Except for a short segment in Milwaukee where the applicant operates over a line of its wholly owned subsidiary, and between Howard Street and Roosevelt Road, Chicago, approximately 12.04 miles, where the applicant operates under trackage rights over the elevated line of the Chicago Transit Authority, all the mileage sought to be abandoned is on North Shore owned right-of-way.

Similar applications with respect to the abandonment of intrastate operations by the applicant were filed with the State commissions of Wisconsin and Illinois. Numerous protests were filed against the North Shore's proposals by and on behalf of the cities and villages served by the applicant, commuter associations, industries, railway employees' organizations, and individual users of the applicant's service. Upon request, the application filed with the Illinois Commerce Commission and the one filed with us were the subject of a joint hearing. On November 24, 1959, the Illinois Commerce Commission denied the application filed with that authority.

An examiner's proposed report was served in this proceeding in which it was recommended that we overrule protestants' pending motions to dismiss the application for want of jurisdiction, and that a certificate of public convenience and necessity be issued permitting abandonment and abandonment of operations, as to interstate and foreign commerce, by the North Shore of its entire railroad service. Exceptions to the proposed report were filed by the protestants, and the applicant replied. Oral argument was heard. Unless otherwise indicated, all points hereinafter mentioned are in Illinois.

The applicant's predecessor railroad company, on November 1, 1946, emerged from reorganization under chapter X of the Bankruptcy Act. Thereafter it purchased certain buslines and bus and rail equipment. In 1953 there was a voluntary reorganization with the approval of the Illinois Commerce Commission under which certain properties including the bus companies, real estate, certain cash, and government securities having a total net value of $4,973,462 were transferred to a new parent or holding company, the Chicago, North Shore System, Inc., the name of which in 1956 was changed to the Susquehanna Corporation. The remainder of the operating assets consisting largely of the railroad properties and most of the line's liabilities were transferred to a new company, the Chicago

North Shore and Milwaukee Railway, the present applicant. The stock of the railroad also was transferred to the holding company. Thereafter the holding company made a loan of $500,000 to the applicant, of which $200,000 remains unpaid. The stated purpose of the reorganization was, in part, to place existing funds in a company not subject to regulation as a public utility in order that investments might be made more freely. Since then the parent company has made purchases of various oil and uranium properties.

At the outset, we must determine the question of law interposed by two separate motions filed by protestants challenging our jurisdiction herein. The applicant contends that we have jurisdiction. The motions are identical in that each alleges the North Shore to be an electric suburban and interurban railway not operated as a part of a general railroad system of transportation, and therefore exempt from our jurisdiction pursuant to the provisions of paragraph 22 of section 1 of the act. The same contention was presented by protestants in *Chicago N. S. & M. Ry. Abandonment*, 290 I.C.C. 765, wherein the applicant was permitted to abandon its so-called shore line route in Lake and Cook Counties. The cited case contains a complete and comprehensive discussion of the law applicable to the jurisdictional question, including the cases relied upon by protestants in support of their contention, which will not be restated here. We are convinced that a railroad, such as the North Shore, operating between Chicago and Milwaukee, is not a street suburban or interurban electric railway within the meaning of section 1(22).

The North Shore handles about 8,000 round-trip passengers a day, most of whom are commuters going to and from their work in Chicago and its suburbs or in Milwaukee, Kenosha, Racine and Oak Creek, Wis. During 1958 a total of 5,151,695 passengers were handled reflecting an increase since 1949 of about 20 percent. In view of such heavy commuter movement and their need of and preference for the carrier's service as shown by the record, the operation of the North Shore should be continued if at all possible. The patrons are willing to pay a premium fare for the convenience of using the North Shore service to and from the stations located in the Loop of downtown Chicago. In 1958, the North Shore commuters paid in excess of a half million dollars for that privilege rather than using the service of the competing Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, both of which terminate at separate stub-end terminals west of the Chicago River some distance from the Loop.

We are cognizant of the continuing financial operating deficits sustained by the applicant in recent years. Its average annual loss for the 4 years 1955–58 has been about $340,000. In 1958, such loss

amounted to $246,160, and for the last 6 months of that year its system operations resulted in a modest profit of about $3,900. The operating losses sustained by the applicant in 1952 amounted to $672,772, in 1953 to $488,010, and in 1954 to $364,253. It seems clear, therefore, that the applicant's losses from system operations have decreased somewhat since the abandonment of its so-called Shore Line in 1955. Excluding depreciation, the applicant had a cash income in 1958 of $78,840.

Traditionally in the past, the fares of the North Shore have been higher than those of the North Western and the Milwaukee to and from comparable competing stations. The last fare increase on the North Shore was in 1957. Since then the commuter fares on the Milwaukee have been increased some 43 percent, and those on the North Western about 29 percent which, in effect, eliminated or substantially reduced the higher fare differential favoring the North Shore. At the hearings herein, the users of the North Shore testified that they would not object to a reasonable fare increase; and more recently regulatory authorities have shown a general tendency of permitting commutation fares of common carriers to be raised sufficiently to pay the full cost of providing such service. Protestants have filed a complaint with us requesting that the fares of the applicant be increased pending determination of the abandonment application. We are of the opinion that before abandonment by the North Shore is to be permitted, a request for a substantial fare increase should be made immediately by the applicant, and operations should be continued for a reasonable period thereafter in order to determine what effect such increase would have on its financial status.

Along this same line, and in furtherance of possible continued operations without loss, the North Shore should endeavor to effectuate more stringent operating economies in amounts greater than those which already have been accomplished. We deem it unnecessary to detail specifically how this might be done, but would suggest that every phase of the operation be scrutinized carefully, including such items as equipment repairs, deferred maintenance, employee relationships, power costs, trackage right rentals, mechanized machinery for right-of-way work, local and State taxation, and assessments for public improvements which might result in savings to the applicant. We feel that these matters are within the managerial discretion of the applicant, and should be pursued with due diligence and dispatch. In other words, it is required of the applicant that it seek all possible means of increasing revenues and reducing operating expenses, before we issue a certificate permitting abandonment of its

operations. The present record shows, and we find, that the applicant has failed to exhaust all existing possibilities in this regard.

With respect to operating expenses chargeable against the operation, it may be well for the applicant to reexamine the depreciation charges, particularly as to rolling stock, currently in effect. According to the record, no adjustment has been made in the depreciation rates for several years, and in view of the added age of the passenger-car equipment now in service, a reduction in the amount of depreciation charged in performing operations might well be justified.

We wish to point out, however, that future operations are not the responsibility of the applicant alone. The State of Illinois, the communities served, especially the termini, the passengers using the service, and applicant's employees should cooperate in attaining that goal. Discretion must be exercised to avoid dissipation of the additional revenues which may result from a fare increase. State and local authorities should avoid, if possible, assessment against the applicant of large sums of money as its share of the cost of public improvements, which under present circumstances it can ill afford, if operation is to continue. Applicant estimates that proposed public improvements in connection with highway construction at Milwaukee will cost it in excess of $1 million, but the protestants contend that such estimated amount is highly speculative and greatly exaggerated. They state that the highway improvements probably will be made at Federal expense, with only minor expenditures assessed against the North Shore. It is doubtful that the present precarious financial condition of the applicant can support any substantial increased expenditures resulting from public improvements.

Protestants contend that failure of the applicant to seek a fare increase indicates that it is not interested in conducting a profitable operation and thereby affording the public the commuter transportation service which it so desperately needs. In support of this theory, they point to the survey conducted by a firm of financial analysts in 1954, the author of such report being president of the applicant when the instant application was filed. The report recommended that the parent company, Susquehanna Corporation, endeavor to dispose of all of its railroad assets and operations, whether or not the railroad operations could be conducted at a profit, and make use of a tax shelter of approximately $20,000,000 which would be created thereby. It was estimated that this would produce savings in Federal taxes of $10,000,000. Protestants point out that the application in this case is being processed precisely in accordance with the time schedule contained in the foregoing report, in that the abandonment of the entire line was not to be undertaken until the

tax shelter created by the previous abandonment of the Shore line route had been absorbed and the parent company was in a position to take advantage of the new and larger tax shelter that would stem from the disposition of the remaining railroad assets. Obviously the abandonment application should not be denied for the reason that substantial tax savings probably would result to the Susquehanna Corporation. On the other hand, where a carrier is relied upon by approximately 8,000 persons to provide daily transportation service to and from their place of employment, we are of the opinion that a substantial public need is indicated. Under such circumstances we must be certain that everything possible has been done to operate the line profitably and that its proposed abandonment is not, as alleged, merely a convenient method of securing tax reductions for the parent company which would benefit thereby to a far greater extent than it could hope to benefit from continuing service to the public at a relatively small profit. The last-mentioned factor may not be considered as indicating justification for abandonment of a line of railroad on which the public relies for transportation. In *Atchison, T. & S. F. Ry. Co. Abandonment*, 254 I.C.C. 767(778), with reference to tax savings of a similar nature, we said:

> However, we do not believe that such matters have any reasonable relation to the issues of public convenience and necessity which we must decide. No stigma attaches because a railroad uses all lawful means to lighten its tax burden, but the fact that an applicant's savings in taxes by an abandonment probably will be greater than any profit in the future from the continued operation of the line, is not a fact which we will consider in determining the public need therefor.

In view of the considerations mentioned herein, we conclude that action on the application should be deferred for a period of 1 year to enable a determination of possible continued operation by the North Shore without loss. During this time, applicant, in addition to consideration of the possible economies noted herein, should, in cooperation with regulatory bodies, its employees, State and local authorities, and the public, endeavor to further explore the possibility of reducing operating expenses. Any fare increase that may be granted must be accepted and applied pending our final determination herein.

An appropriate order will be entered.

COMMISSIONER GOFF did not participate.

U.S. GOVERNMENT PRINTING OFFICE: 1966

F-9186

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 20245 [1]

CHICAGO NORTH SHORE & MILWAUKEE RAILWAY ABANDONMENT OF ENTIRE OPERATION

Decided May 16, 1962

1. Certificate and order issued in Finance Docket No. 20245 permitting abandonment by Chicago, North Shore & Milwaukee Railway of its entire line of railroad in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill. Prior report, 312 I.C.C. 99.
2. In No. 33337, complaint dismissed.

Appearances as in prior report and, in addition, *L. Agnew Myers, Jr.*, for applicant; *William G. Clark* and *Edward V. Hanrahan* for the Illinois Commerce Commission, protestant; *William B. Peer*, *Donald J. Curtin*, and *Frank Benner* for railway labor organizations, protestants; *George E. Rice* for a protestant; and *Jordan Jay Hillman* for an interested party.

REPORT OF THE COMMISSION AFTER FURTHER HEARING

TUGGLE, *Commissioner:*

By our prior report [2] of May 4, 1960, 312 I.C.C. 99, we assumed jurisdiction under section 1 (18)-(20) of the act to consider the issues of public convenience and necessity presented by the application for abandonment, and concluded that action thereon should be deferred for a period of 1 year in order to obtain more conclusive facts bearing on the ultimate issue. We took this action despite the continuing deficits sustained by applicant in recent years because we noted a lessening of the deficit trend in 1958, the latest period for which financial results of operations were shown in the prior report, and considered it might be eliminated by higher fares and reduced expenditures. Our conclusions as to what should be done by the parties during the 1-year interim period were summarized as follows at page 104 of our prior report:

During this time, applicant, in addition to consideration of the possible economies noted herein, should, in cooperation with regulatory bodies, its employees, State

[1] This report also embraces No. 33337, The North Shore Commuters' Association, Inc. v. Chicago North Shore & Milwaukee Railway, which was reopened for further hearing with the title case. No testimony directed to the issues in No. 33337 was offered at the further hearing, and extended discussion of that proceeding in this report is not necessary.

[2] In response to a petition of applicant filed June 6, 1960, by our order of July 6, 1961, we made certain corrections at pages 101 and 102 of the interim report as printed in loose leaf form. These corrections do not require repetition here. By the same order, a petition for reconsideration filed June 9, 1960, by the Illinois Commerce Commission on the question of jurisdiction was denied.

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and local authorities, and the public, endeavor to further explore the possibility of reducing operating expenses. Any fare increase that may be granted must be accepted and applied pending our final determination herein.

Thereafter, applicant filed the following documents: On February 15, 1961, a petition for vacation of our order of May 4, 1960, and the granting of authority for immediate abandonment of the railroad; on April 7, 1961, a petition for "expedited procedure" in the case; and on April 17, 1961, a motion for leave to file additional evidence in the form of the then current income accounts of applicant. In May and June 1961, certain protestants filed petitions and motions which need not be described now, and numerous replies to these several pleadings were filed by the parties. After consideration, all these petitions and motions were denied by our order of July 6, 1961, except that (1) the proceeding was reopened for further hearing to include all the issues presented by said pleadings, and (2) the corrections in the prior report as mentioned in footnote 2 were made. That order also made a finding that circumstances require the omission of a hearing examiner's recommended report on further hearing.

Further hearing has been held, briefs and reply briefs were filed, and we have again heard the parties in oral argument. The description of the rail properties of applicant which it proposes to abandon, of the prior proceedings before us in this case, and of the corporate history of applicant, are set out in the prior report and will not be restated.

Contrary to the decline in 1958 of applicant's deficits, financial data for subsequent periods show, for the most part, substantially larger deficits as reflected in the following data:[3]

Year	Operating deficit	Corporate deficit
1955	$991,874	$364,233
1956	515,057	344,295
1957	622,413	414,914
1958	462,615	346,189
1959	398,885	309,143
1960	428,289	299,720
Ended May 31, 1961	539,572	427,621

The latest data available at the time of our prior report were for 1958, and we there commented that for the last 6 months of 1958 applicant realized a profit of $3,900, that applicant's losses had decreased somewhat since the abandonment of its so-called Shore Line in 1955, and that, excluding depreciation, applicant had a cash income in 1958 of $78,840.

[3] We agree with the contention of protestants that, in considering these deficit figures as a measure of future possibilities, the amount of $38,232, representing a retroactive adjustment of wages for an earlier period, should be deducted in determining the results for the year ended May 31, 1961.

Financial results of applicant's operations worsened immediately. Except for a reduction of the operating deficit in 1959, the losses of applicant have mounted steadily. Cash losses of applicant, excluding depreciation, were $15,507, $91,767, and $179,011 in 1959, 1960, and for the year ended May 31, 1961, respectively.

The deficit figures shown do not take into consideration applicant's failure to keep up "normal maintenance" of its ways and structures in recent years. "Normal maintenance" includes necessary painting, and replacement of rail, ballast, ties, trolley wire, and poles, and annual cost thereof has been estimated at $394,000. This figure is not seriously disputed and its inclusion in applicant's costs would result in operating deficits of $723,000, $792,000, and $864,000, and corporate deficits of $624,000, $693,000, and $762,000, respectively, for 1959, 1960, and the year ended May 31, 1961.

Applicant's continuing and increasing deficits occurred despite an average increase in interstate and intrastate passenger fares of 23 percent, which became effective in June 1960,[4] a result which was in sharp conflict with protestants' predictions. The Illinois Commerce Commission had estimated that the fare increase would increase revenues by $500,000 a year but additional revenue for the year ended May 31, 1961, was $118,493, some 76 percent less than its estimate.

Offsetting the fare increase were two factors, a wage increase of 21.5 cents an hour for applicant's operating and nonoperating employees, effective June 1, 1960, increasing applicant's cost for the first full year it was in effect by $266,909, and the opening on November 5, 1960, of a 6-lane freeway extending from a point near the Loop in Chicago to the Edens Expressway. As is apparent, the increased labor costs exceeded the increased revenues by $148,416. Notwithstanding this wage increase, however, the wage scales of all of applicant's contract employees are below the national average for employees performing the same duties for other railroads.

The number of passengers carried by applicant has generally decreased since January 1959, when 451,805 passengers were carried. In December 1960, the first full month after opening of the freeway, the number of passengers carried by applicant decreased by 46,029 from the corresponding month in 1959. In January 1961, the number of passengers carried was less than 400,000 for the first time in 2 years, and in July 1961, the number had further declined to 350,863. Attached hereto as appendix I is a table showing the number of passengers carried each month by applicant for the year 1959 through July 1961, and the increase or decrease in passengers carried in 1960

[4] The published interstate fares satisfied the complaint in No. 32337 which was dismissed by order of July 1, 1960. However, by our order of July 6, 1961, we reopened the proceeding and assigned it for further hearing on a consolidated record with the proceeding in Finance Docket No. 20245.

and the first 7 months of 1961 in comparison with corresponding months in 1959 and 1960.

An on-and-off count of all passengers carried during the week of November 10–16, 1960, showed that between all points served, Monday through Friday, a daily average of 7,742 passengers rode southbound and 7,014 traveled north. November 11 was a holiday, on which travel was somewhat heavier than on other weekdays. As shown above, passenger traffic has declined in 1961. Our conclusion in the prior report that the North Shore handles about 8,000 round trip passengers a day is modified conformably.

Applicant's passenger cars are antiquated. Of its 135 passenger cars, some 127 are over 30 years old and have a seating capacity of approximately 56 passengers a car, whereas the passenger cars purchased by the Chicago and North Western Railway for commutation service in 1959 and later have a seating capacity for either 155 or 161 persons. A line of the Chicago and North Western Railway parallels applicant's line on the east, and a line of the Chicago, Milwaukee St. Paul and Pacific Railroad is parallel to that of applicant on the west, between Milwaukee, Wis., and Chicago. In appendix II the location of stations on these two railroads with reference to applicant's stations is set out, with distances shown between the stations.

After a detailed study of applicant's operations, engineers of the Chicago Transit Authority made a report dated February 17, 1959, on the probable results of operation by that authority of applicant's entire line, in passenger service only, under conditions prevailing during the year ended September 30, 1958. This study was made on the assumption that some agency would acquire the properties of applicant, would pay all real estate taxes and the cost of all maintenance of way and structures thereon, and that the authority would continue the passenger operations in their entirety. It was estimated that the authority would sustain an operating loss of $500,000 for that year of operation under those conditions. For comparative purposes, however, a deduction of $33,000 should be made from that estimated deficit, to represent the difference between the reserve required by law to be maintained by the authority to meet claims for damages, and the actual damage claims paid by applicant during the year 1957.

Protestants have endeavored throughout the proceeding to show that changes can be made in applicant's operations sufficient to offset its deficits and return a profit. Proposals directed toward that end were submitted at the hearing by three witnesses, Robertson, a transportation analyst employed by the Illinois Commerce Commission, and Martin and Weston, a certified public accountant and a well qualified consulting engineer, respectively, who were employed by protestant North Shore Commuters' Association, Inc.

Weston adopted plans submitted by Robertson for discontinuance, in whole or in part, of operation of a number of trains, as later mentioned. Other savings recommended by Robertson included: (1) elimination of a chartered bus used in making three round trips daily with employees of applicant between Briergate, Lake Bluff, and Highwood, Ill., at an annual cost of $11,358; (2) elimination of three operators of a manual block system working from a tower at Kenosha, Wis., $18,308 per year; and (3) elimination of overtime hours worked by applicant's employees to the extent that such overtime exceeded the overtime hours worked by employees of the Chicago, South Shore & South Bend Railway for the same period, which would have saved $62,262 in the year 1960. Total savings so computed, after deduction of $5,498 for loss of revenue from certain trains eliminated, were $85,430 per year.

Martin estimated that savings of $24,962 per year in salaries of employees would result from elimination of daily verifications of envelopes turned in by conductors, "simplification of interline accounting," and discontinuance of verification of invoices less than $35 in amount.

Weston estimated that savings of $400,778 could be accomplished by his following proposals: (1) rescheduling of applicant's trains and changes in their consist; (2) discontinuance in whole or in part of the operation of a number of trains;[8] and (3) substantial curtailment of the present number of inspections of equipment, complete overhauls of equipment, and cleaning of cars. Under this plan, regular inspection of conventional passenger cars in the shops of applicant would be made once every 3,400 miles of operation, or about once a month, and major overhauls, which include heavy repairs of such cars, would be made after each 360,000 miles of operation, or about once every 10 years.

Protestant North Shore Commuters' Association, Inc., indicated that it would not oppose a fare increase to yield $125,000 per year if the railroad is not abandoned; and its president would recommend a further fare increase to offset the difference between the reduction in charges proposed by the Chicago Transit Authority to applicant and the sum of $125,000; and that such increase in fares could be "in the area of 5 percent." A 5-percent increase in the total of $4,686,337 of passenger revenue of applicant for the year ended May 31, 1961, would be $234,317 per year.

Applicant has assumed obligation to operate the chartered bus in a number of agreements with labor organizations, because it replaces the transportation of employees formerly traveling over the aban-

[8] The entire "300 series" of five trains in each direction on the Lake Bluff-Mundelein Division on weekdays, and trains 1, 6, 19, 413, 419, 424, and 431.

doned Shore Line. The bus handles three different groups of employees, with different starting and quitting times, and could not be discontinued without agreement thereto by the employees affected. Elimination of the towermen at Kenosha would require our prior approval, and has not been shown to be conducive to safe operations.

The verification of conductors' envelopes was abandoned by applicant in 1958 as an economy measure. Witness Martin's "interline accounting" relates to "passing reports" as to the location of freight cars while on applicant's line, which are made on a part-time basis by various employees performing other work. One comptometer operator checks all invoices, in small or large amounts, and performs other duties as well. Opportunity for effecting economies in these areas of operations appears to be almost nonexistent.

Witness Gannett, an engineer with extensive experience in the operations of and equipment maintenance on eastern railroads, who was retained by applicant, considered witness Weston's plans generally to be impracticable, and opposed particularly any relaxation of the present system of inspection and overhauling of applicant's old passenger cars as unsafe practice. Both Smith, a consulting engineer who headed a group employed by applicant, and Gannett, stated that in all their experience with railroad car maintenance, and the accounting for its costs, the costs of materials used have always constituted at least 50 percent of the cost of labor performed. In computing his maintenance costs under a new schedule of operation, witness Weston estimated material costs for maintenance at $81,901 per year, which is only 20 percent of the estimated labor cost. Applicant's actual cost of material for maintenance for the year ended July 31, 1961, was about $234,900, which was 42 percent of the labor cost. Accepting 40 percent of the labor cost as valid for determining the material costs for maintenance, Weston's estimated cost of $81,901 for materials should be increased to $163,802 and his estimated savings reduced by one-half of this increase or $81,901.

A change in applicant's practice made in October 1960, in accounting for revenues from tickets sold for future use, is in accord with our accounting rules, and the resulting credit of $19,840 in revenue to the month in which the tickets were used, rather than when they were sold, did not result in an understatement of total passenger revenues.

Computations submitted by the commuter's association to show that applicant could continue operations at a profit through effecting certain savings are reflected in appendix III. That appendix reproduces their computations, with certain corrections * from the record,

* The principal correction, in accord with the testimony at page 648 of the transcript on further hearing, is the change in the amount of savings from "Revised Operating Plan" from $407,276 to $400,778.

and also contains a restatement of the computations with adjustments as follows: deduction of $81,901 from item (1) Revised Operating Plan, to reflect increase of witness Weston's material costs in maintenance work to the basis of 40 percent of his estimated labor costs; elimination of items (3), (4), and (5) relating to the chartered bus, the Kenosha tower post, and accounting department employees; and elimination of item (9), "passenger revenue excluded" as an improper deduction. The elimination of only those stated items where it is apparent that savings cannot be effected, shows that applicant would still have operated at a loss even without including as a cost item any amount for "normal maintenance."

The computations of protestant Illinois Commerce Commission on brief are set out in appendix IV. They take into consideration as a loss item "normal maintenance" of $324,000, but differ from the computations just discussed in that they include under the title "4-point Program," savings proposed of $375,000 per year, computed as follows:

(1) Reductions in charges of Chicago Transit Authority	$11,162
(2) Savings from acceptance of voluntary wage cuts by employees	125,000
(3) Revenue from increased fares, about	238,000

The estimated savings in item (1) must be reduced to $5,581, as the Chicago Transit Authority would agree to only a 3-percent reduction in its present charges for use of its tracks and this only for a temporary period. The savings in item (2) from voluntary wage cuts should be eliminated entirely since the railroad labor organizations would make no commitment as to the "length or term" of acceptance of such a wage cut; also acceptance thereof was conditioned upon our issuance of an order denying the abandonment here proposed, and further conditioned upon the reduction of mileage charges of the Chicago Transit Authority in the amount of $125,000 per year, or a fare increase to offset any reduction below the sum mentioned. The estimated increase in revenues from higher fares in item (3) should be reduced to $58,579, which is one-fourth of the mathematical increase, a figure in line with the latest increase in passenger fares. The total for the 4-Point Program so adjusted is $64,160.

Elimination from "Robertson's savings" of the chartered bus item and that for the Kenosha towermen, items which are duplicated in "Weston's savings," would reduce savings proposed by the former to $55,764; and, for reasons stated in connection with the previous computation, "Weston's savings" are reduced to $318,877, and "Martin's

savings" (item 5 in appendix III) are eliminated. Effectuation of these adjustments in the computations of the Illinois Commerce Commission would show a substantial loss for applicant based upon the use of financial data available for the year ended May 31, 1961.

We do not agree with protestants' view that the predominant cause for the reduced traffic of applicant, and the consequent losses, was a severe nationwide recession of 1960–61. Although there was a "recession" during a portion of those years, employment figures and permits for new homes showed improvement in the area herein involved in 1961. The employment picture showed improvement in May through July and permits issued for new homes in 16 towns in Illinois served by applicant increased by 16 percent over the number issued during the same period in 1960. However, passengers transported by applicant for the first 6 months in 1961 averaged about 60,000 less a month than was carried for corresponding months in 1960.

We realize that the making of ancillary findings is an empirical rather than a scientific process and that we cannot determine exactly the past impact of the opening of a modern highway or a business recession upon the financial status of applicant any more readily than we can determine precisely the future effect of a further increase in fares. We have considered it proper to go into considerable detail in such matters, however, in recognition of the strenuous efforts of protestants to find means to preserve the applicant's line as a convenient public transportation facility.

We cannot find on this record that the present management of applicant has failed to exert its best efforts to continue operations without loss, despite the fact that the parent company will benefit financially if the railroad is abandoned. To the contrary, we believe that those operating applicant's line are entitled to full credit for maintaining a safe operation, without serious criticism from the public of the service rendered, on a railroad which for years has had a minimum of maintenance work performed, and which has only antiquated equipment available for use. In this connection, it is noted that for the year ended May 31, 1961, applicant reduced its operating expenses, exclusive of wages paid, by $221,077 below those for the previous year.

The failure of applicant to increase fares until required to do so by the action of the commuters' association and our findings in the prior report cannot be criticized, as the prediction of its representatives that such action would not result in a net gain now has been realized. As to the wage increase of June 1960, no suggestion as to what might have been done differently has been or now is offered;

and the argument of applicant's counsel that to the extent that its employees have worked at wages which were and are below the national average for such work amounted to a "subsidy" to the railroad and its patrons has merit. It is true that applicant might have discontinued certain unprofitable trains entirely, and curtailed service on others, but the record is clear that the savings thus accomplished would make no effective contribution to the overall financial problems of the applicant.

It is significant that the economies recommended by protestants are either in the area of providing less service to those using the facilities of applicant, or in cutting expenditures which contribute directly to safety of operation. Even so, protestant's computations directed toward future operation by applicant without loss either ignore the cost of maintenance which cannot be postponed indefinitely, or assume contributions from higher passenger fares and acceptance of lower wages by employees which reasonably cannot be expected to materialize. Giving weight to these considerations, the computations indicate a continued net loss by applicant of $300,000 per year or more, even if savings recommended by protestants which have not been discussed at length herein, amounting to about $300,000 per year, could be accomplished. In prior cases carriers have not been required to continue the business of carriage where their overall operations were conducted at a systemwide deficit for a substantial period of time and there was no reasonable prospect of conducting those operations at a profit in the foreseeable future. *Jay Street Connecting R. Abandonment of Entire Line*, 307 I.C.C. 137; *Nezperce & I. R. Co. Abandonment*, 257 I.C.C. 81. Accord *Brooks-Scanlon Co. v. R. R. Comm.*, 251 U.S. 396, 399 (1920).

As we said in the prior report, the fact that the parent Susquehanna Corporation will realize substantial tax savings in the event of abandonment has no bearing upon our determination whether public convenience and necessity permit abandonment, except that it might lead to a more thorough inquiry as to the facts. There is no evidence of record showing any financial dealings or other arrangements between applicant and its parent company which might have improperly affected applicant's case in support of the proposal to abandon all operations.

For reasons set out in prior cases in which all operations of a railroad have been authorized to be abandoned, no conditions for the protection of employees will be imposed to this proceeding. *Susquehanna & N. Y. R. Co. Abandonment*, 252 I.C.C. 81, 88; and *Missouri & A. Ry. Co. Receivers Abandonment*, 271 I.C.C. 171, 187.

CONCLUSION

We conclude and find that the present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation; that abandonment of all operations is warranted, subject to the condition that applicant shall sell the entire line, or any portion thereof, to any responsible person, firm, or corporation offering, prior to the effective date of the certificate and order permitting abandonment, to purchase the same for continued operation (upon approval of this Commission) at a price not less than the net salvage value of the property sought to be acquired; that the imposition of conditions for the protection of employees adversely affected by the abandonment is not justified in the circumstances of this case; and that the inconvenience to users of applicant's service which will result from the abandonment will be mitigated by the availability of rail service provided by the Chicago & North Western Railway and the Chicago, Milwaukee, St. Paul and Pacific Railroad.

Subject to the condition stated, we find that the present and future public convenience and necessity permit abandonment by the Chicago North Shore & Milwaukee Railway of its entire line of railroad in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill.

An appropriate certificate and order will be issued, effective 35 days from date of service, dismissing the complaint in No. 33337, and, in Finance Docket No. 20245, setting forth suitable provisions for the revocation of concurrences and powers of attorney, the cancellation of tariffs, and the submission of journal entries.

COMMISSIONER TUCKER did not participate.

317 I.C.C.

APPENDIX I

Chicago North Shore & Milwaukee Railway increase or decrease in revenue passengers carried, 1960 over 1959 and July 30, 1961 over 1960

Month	Passengers carried		Increase or (decrease)	Percentage
	Year	Year		
	1960	1959		
January	437,354	451,805	(14,451)	(3.2)
February	434,617	416,012	18,605	4.5
March	462,256	441,868	20,388	4.7
April	433,896	420,742	13,153	3.1
May	428,730	421,153	7,597	1.8
June	427,944	430,235	(2,291)	(0.6)
July	415,309	447,338	(32,029)	(7.2)
August	423,145	428,267	(5,122)	(1.1)
September	408,218	423,879	(15,661)	(3.7)
October	428,591	446,340	(17,749)	(4.0)
November	415,322	439,817	(24,495)	(5.6)
December	415,252	461,281	(46,029)	(10.0)
Total	5,140,661	5,228,338	(87,677)	(1.7)
	1961	1960		
January	392,525	437,354	(44,829)	(10.3)
February	383,798	454,617	(70,819)	(15.3)
March	398,689	462,256	(63,567)	(14.2)
April	369,217	433,895	(67,678)	(15.6)
May	371,969	428,730	(56,761)	(13.2)
June	369,099	427,944	(58,845)	(13.7)
July	350,833	415,309	(64,446)	(15.5)
7-monthly total	2,611,180	3,060,125	(426,945)	(14.1)

APPENDIX II

Location of stations on the Chicago & North Western Railway and on the Chicago, Milwaukee, St. Paul and Pacific Railroad with reference to location of nearest stations of Chicago North Shore and Milwaukee Railway

(1) North Shore stations	Distance	(2) C. & N.W. Ry. stations	Distance	(3) C., M., St. P. & P. RR. stations
	Miles		Miles	
Milwaukee, Wis.	1	Milwaukee	0.25	Milwaukee.
Racine, Wis.	2	Racine		
Kenosha, Wis.	1.37	Kenosha		
Zion	1	Zion		
Waukegan	0.9	Waukegan		
North Chicago Junction	0.47	North Chicago		
Downing	0.68	Great Lakes		
Lake Bluff	0.17	Lake Bluff		
Deerpath	1.3	Lake Forest		
Sheridan Elms	1.9	Fort Sheridan	1.4	West Lake Forest.
Highwood	1.4	Highwood		
Briergate	1.8	Highland Park	1.9	Deerfield.
Woodridge	2	Ravina		
		Braeside		
Northbrook	2	Glenco	2	Northbrook.
		Hubbard Wood		Techny.
Northfield	2.3	Winnetka		
		Indian Hill		
		Kenilworth		
Glenayre	2.3	Wilmette	2.4	Glenview.
Harmswood	2.7	Evanston	2.2	Golf.
Shakia	4	Davis Street	2.1	Morton Grove.

Explanation: Where no station is shown under column (3) there is no station near applicant's line. Where no station is listed in column (1), distances between stations are not of record. All points named are in Illinois, except as indicated.

APPENDIX III

Table from brief of protestant North Shore Commuters' Association, Inc., entitled "Basis for continued operation of the North Shore without loss."

Available savings:		
(1) Revised operating plan (Weston's savings)	$400,778	
(2) Discontinue train No. 431	2,953	
(3) Abolish charter bus	11,358	
(4) Abolish Kenosha tower post	18,308	
(5) Six accounting department employees	24,962	
	458,359	
(6) Less revenue loss from 300 trains and No. 19	5,498	
Net savings		$452,861
Present loss:		
(7) As reported, from June 1, 1960–May 3, 1961	437,621	
(8) Less backpay for prior period	38,232	
(9) Less passenger revenue excluded	19,840	
Adjusted loss		379,549
Net income		73,312

Above table, with adjustments as explained in report

Available savings:		
(1) Revised operating plan	$318,877	
(2) Discontinue train No. 431	2,953	
(3) Abolish charter bus	(1)	
(4) Abolish Kenosha tower post	(1)	
(5) Six accounting department employees	(1)	
	321,830	
(6) Less revenue loss from 300 trains and No. 19	5,498	
Net savings		316,332
Present loss:		
(7) As reported, from June 1, 1960–May 31, 1961	437,621	
(8) Less backpay for prior period	38,282	
(9) Less passenger revenue excluded	(1)	
Adjusted loss		399,339
Net loss		83,007

[1] Eliminated.

APPENDIX IV

Table from brief of protestant Illinois Commerce Commission to demonstrate how Chicago North Shore & Milwaukee Railway can be operated without loss

North Shore figures:	
Book loss, 12 months ended May 31, 1961	$437,621
Less backpay for prior period	38,232
	399,389
Plus adjustment to reflect "normal maintenance"	324,000
Total net loss (adjusted)	723,389
Protestants' figures:	
Weston's savings	400,788
Robertson's savings (eliminating overlap with Weston)	85,430
4-Point program savings and increased fares	373,000
Martin savings	24,962
	886,180
Net income	162,791

Above table, with adjustments as explained in report

North Shore figures:	
Book loss, 12 months ended May 31, 1961	$437,621
Less backpay for prior period	38,232
	399,389
Plus adjustment to reflect "normal maintenance"	324,000
Total net loss (adjusted)	723,389
Protestants' figures:	
Weston's savings	318,877
Robertson's savings	55,764
4-Point program savings and increased fares	64,160
Martin savings	[1]
	438,801
Net loss	284,588

[1] Eliminated.

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INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 20245

CHICAGO NORTH SHORE & MILWAUKEE RAILWAY ABANDONMENT OF ENTIRE OPERATION

Decided October 15, 1962

1. Upon reconsideration, findings of the prior report after further hearing of May 10, 1962, supplemented and affirmed. Certificate and order modified and made effective 15 days from date of service hereof. Prior reports 312 I.C.C. 99 and 317 I.C.C. 191.
2. Motion and petitions of protestants for deferral of the effective date of the certificate and order for a period not less than 60 days from the date of disposition of petitions for reconsideration, denied.

Additional appearance: *S. J. Gromfine* for protestant railway labor organization.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

Our prior report after further hearing of May 10, 1962, 317 I.C.C. 191, found, subject to a condition hereinafter described, that the present and future public convenience and necessity permit abandonment by the applicant Chicago North Shore and Milwaukee Railway of its entire line of railroad in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill.[1] The effective date of our certificate and order giving effect to those findings has been postponed pending disposition of petitions for reconsideration filed by protestants.[2]

By a separately filed motion the State of Illinois and others request modification of our certificate and order, if adhered to, so that it will not become effective until a specified period, not less than 60 days, after disposition of their petition for reconsideration. Substantially the same relief is requested by the petitions of the city of Milwaukee and of the State of Illinois and others. The petitions are granted to the extent they seek reconsideration.

[1] The prior report and order of May 10, 1962, embraced and dismissed the complaint in No. 33337. The petitions considered herein make no reference to that proceeding, nor request reconsideration of our action thereon.

[2] Illinois Commerce Commission, North Shore Commuters Association, Chicago-Milwaukee Area Transportation Council and 10 cities and villages, jointly; the city of Milwaukee, Wis.; Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO; and the Brotherhood of Steamship Clerks, Freight Handlers, Express and Station Employees and other labor organizations, jointly.

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We find no merit in petitioners' arguments that we erred in finding that applicant's present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation. The basis for this finding is adequately set forth in the prior report.

Petitioners question our jurisdiction to issue a certificate authorizing abandonment of applicant's line. First, they contend that applicant is an interurban electric railway not operated as a part of a general steam railroad system of transportation, within the purview of section 1(22) of the Interstate Commerce Act, and that, thus, abandonment of its lines is excluded from our jurisdiction.

In disposing of a similar contention that applicant is an electric interurban railway not operated as a part of a general railroad system of transportation, our interim report of May 4, 1960, 312 I.C.C. 99, referred to our earlier decision in *Chicago N.S. & M. Ry. Abandonment*, 290 I.C.C. 765, wherein the same question was presented. That decision contains a complete and comprehensive discussion of the applicable law and facts as related to the indicated contention, including a discussion of the cases relied upon by petitioners.

The physical characteristics of applicant remain essentially unchanged since our decision in *Chicago N.S. & M. Ry. Abandonment*, *supra*. It continues to engage in the transportation of both passengers and property across the Wisconsin-Illinois State line. While it is principally a passenger carrier, we found in the cited decision (page 769) that freight accounted for approximately 16.5 percent of its total operating revenues in 1953. The record herein discloses that in 1960 freight traffic accounted for about 14.6 percent of its total revenues. Practically all of the freight handled is interchanged with other railroads. Applicant's line is physically connected at six different points with one or more interstate carriers, namely the Elgin, Joliet and Eastern Railway Company, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, and the Chicago and North Western Railway Company, and it continues to participate in more than 1,000 tariffs with class I trunkline carriers. We need not elaborate further. Other status-determining characteristics of applicant detailed in our decision cited above continue to be present. And, as we stated therein:

> From what has been said by this Commission and the courts in subsequent decisions, it also seems clear that the decision of the Supreme Court in *United States* v. *Chicago, N.S. & M.R. Co.*, *supra*, holding the applicant's predecessor an interurban electric railway within the exemption clause of section 20a of the Interstate Commerce Act is not binding in this proceeding.

From the above, we conclude that applicant does not fall within the exemption contained in section 1(22) of the Interstate Commerce Act, that it is subject to section 1(18) of that act, and that the application under consideration in this proceeding is a matter within our jurisdiction.

Petitioners also contend that, even if the applicant is subject to the provisions of section 1(18), we are without jurisdiction to authorize it to abandon intrastate service but are limited to authorizing abandonment as to interstate commerce, relying principally upon the decision of the United States Supreme Court in *Texas* v. *Eastern Texas R. Co.*, 258 U.S. 204. The facts in the cited case differ from those present here. There, the Court referred to the fact that the railroad involved was located entirely within the State of Texas and was owned by a Texas corporation, and it found that the situation and ownership of the road were such that interstate and foreign commerce would not be burdened or affected by the continuance of intrastate business over the line.

In a later decision, *Colorado* v. *United States*, 271 U.S. 153, the Court sustained our action in authorizing the total abandonment of a branch line, located wholly within Colorado, of a railroad whose system was located partly in Colorado and partly in other States. In referring to the fact that the railroad involved therein, like most other railroads, was chartered to engage in both intrastate and interstate commerce, the Court made the following statement:

> The same instrumentality serves both [intrastate and interstate commerce]. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole.

After noting the statutory exemptions from Federal control contained in section 1(22), with respect to spur, industrial, team, switching, and sidetracks, the Court stated that "as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment."

The Court further stated that while the constitutional basis to issue a certificate of abandonment is the power of Congress to regulate interstate commerce, the statute does not make the issuance of a certificate of abandonment conditional upon a specific finding that continued operation will result in discrimination against interstate commerce or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier. Under the statute, the sole test prescribed is that abandonment be consistent with public convenience and necessity, and in its determination the

"Commission must have regard to the needs of both intrastate and interstate commerce." In discussing this, the Court indicated that an application for abandonment rarely involves an actual conflict between the needs of interstate and intrastate commerce. But wherever such conflicting needs exist, "the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands." In that balancing, "the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the act does not make issuance of the certificate dependent upon a specific finding to that effect."

We consistently have construed the *Eastern Texas R. Co.* case, *supra*, to apply only to abandonments of an entire line of railroad located within one State and not operated as a part of an interstate railway system.[3] In such class of cases, our certificates have authorized only abandonment of operations in interstate or foreign commerce. (*Grand River Valley R. Co. Abandonment*, 202 I.C.C. 359; *Nezperce & I.R. Co. Abandonment*, 257 I.C.C. 81.) On the other hand, we consistently have asserted exclusive jurisdiction to authorize complete abandonment of a line of railroad in the following classes of cases: (1) Abandonment of a portion of a line of railroad by an applicant operating solely within a single State (*Detroit & M. Ry. Co. Abandonment*, 138 I.C.C. 576); (2) abandonment of a line wholly within a State by a carrier which operates a railroad in more than one State or which is a part of a system operating in more than one State (*Chesterfield & L.R. Co. Receivers Abandonment*, 244 I.C.C. 20); and (3) abandonments, as in the instant case, involving a line operated in more than one State (*Tonopah & T.R. Co. Abandonment*, 236 I.C.C. 265; *Missouri & A. Ry. Co. Receivers Abandonment*, 271 I.C.C. 171).

Applicant's line physically crosses the State boundary between Wisconsin and Illinois and it operates in both States, handling passengers, baggage, and freight in intrastate and interstate commerce. Interline tickets are sold for transportation to and from points on its system, and because of its connections with other interstate railroads, as heretofore mentioned, it is able to participate in freight bridge traffic. Its intrastate and interstate operations are commingled and are being conducted as part of the same service. In finding that public convenience and necessity permit the abandonment, we necessarily considered the entire operation and the needs

[3] At first blush, the decision in *Joy Street Connecting R. Abandonment of Entire Line*, 307 I.C.C. 137, may seem inconsistent with the stated principle. However, in that case, although the railroad tracks involved were located solely within one State, the applicant's car float and lighterage operations extended into another State.

of the public for both interstate and intrastate service. As we stated in our prior report after further hearing, all of applicant's present revenues from both interstate and intrastate operations are not sufficient to maintain the facilities necessary to safety of operation. It is obvious that revenues from intrastate operations alone would be insufficient to permit continued safe operations.

It was also shown in our last report that the Chicago & North Western Railway Company, hereinafter called the North Western, serves the considered area between Milwaukee and Chicago, its tracks being located slightly west of and generally parallel to the main line of applicant. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter called the Milwaukee, also operates in this area. Although it does not have comparable stations at all of the points served by the other two carriers, its line is located slightly east of the applicant's line, parallels it in part, and is separated by distances ranging from 0.25 mile to 2.4 miles. The North Western has spent considerable sums for new cars and advertising to increase the patronage on its Milwaukee-Chicago trains. It sustained deficits amounting to approximately $2 million on these operations in 1958–59 and, like applicant, has been faced with the problem of declining patronage.

Each of the three railroads operating in this area are competitive for certain of their passengers moving in intrastate as well as interstate commerce. It is clear that the traffic is not sufficient to support all on a reasonably profitable basis. If applicant continues operations, either on the present basis or solely in intrastate commerce, it will carry passengers who otherwise would patronize the North Western or Milwaukee. Th , the ability of those railroads to continue their present operations in interstate or foreign commerce should be improved by the proposed abandonment by applicant.

It also is important to note that a certificate issued by us authorizing abandonment is permissive and, at applicant's election, the authority granted may or may not be exercised. If our certificate were limited to abandonment of operations in interstate and foreign commerce and the applicant were compelled by the States to continue intrastate operations over separate segments in Illinois and Wisconsin, the economics of the situation would dictate that applicant continue its interstate operations in order to minimize its losses. This would be so notwithstanding our finding that applicant's revenues are such as to make it difficult for a carrier to maintain its facilities in a manner that would insure safe operations. The likely result would be the safety of interstate as well as intrastate passengers would be endangered.

We conclude that the continued operation of the applicant's line, even if confined to intrastate commerce, would constitute an undue burden upon interstate commerce. However, as the Court pointed out in the *Colorado* case, *supra*, the Commission's jurisdiction under section 1(18) of the act is not limited to operations in interstate commerce and to such intrastate operations as may be found to impose an undue burden on interstate commerce. 271 U.S. at page 164. Section 1(18) is not limited to the abandonment of interstate operations but by its terms includes "all or any portion of a line of railroad" subject to part I of the act. Furthermore, paragraph 20 of section 1 provides that from and after issuance of the certificate, the applicant may proceed to abandon "without securing approval other than such certificate." When the Commission finds that the public convenience and necessity permit the abandonment of an entire line of railroad located in more than one State, the States involved cannot frustrate that action by requiring a continuance of intrastate operations. While the existence of an undue burden on interstate commerce properly may be used to state or to justify a particular result, it is not necessary for the Commission to find such a burden where, as here, regulation of the intrastate activities in question is a necessary and proper consequence of effective exercise of the power to regulate interstate commerce. *Cf. Colorado* v. *United States*, *supra*.

For the reasons referred to in our report of May 10, 1962, we determined that no conditions should be imposed for the protection of applicant's employees. The petitioning labor organizations contend that we have recently changed our views respecting the imposition of conditions in cases where an entire line of railroad is permitted to be abandoned, citing the action taken in Finance Docket No. 21499, Savannah Union Station Company Abandonment of Entire Line.

In the report of the Commission, division 3, acting as an appellate division, in Finance Docket No. 21498, *Seaboard Air Line R. Co. Trackage Rights*, 312 I.C.C. 797, decided April 25, 1962, which embraced Finance Docket No. 21499, division 3 imposed conditions similar to those prescribed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271. However, the facts in those proceedings differ substantially from those in the present proceeding. There, it was found that the proposed abandonment was an inseparable part of a plan of operation, the effectuation of which required our approval under section 5(2) as well as a certificate under section 1(18). Also, the abandoning railroad was controlled by, and in reality an instrumentality of, the railroads involved in the related section 5 proceeding. We affirm our conclusion that no conditions should be imposed for the benefit of employees.

Our certificate and order of May 10, 1962, was made subject to the following condition:

> that applicant shall sell the entire line, or any portion thereof, to any responsible person, firm or corporation offering, prior to the effective date of the certificate and order permitting abandonment, to purchase the same for continued operation (upon approval of this Commission) at a price not less than the net salvage value of the property sought to be acquired; * * *.

We are requested to postpone the effective date of our certificate and order for a period of not less than 60 days after disposition of the considered petitions, to permit time for judicial review of our action and to permit the making of financial and other arrangements for purchase, reorganization, and continuance of this important rail service and determination of the salvage value of the property to be acquired. Whether the effectiveness of our certificate should be deferred pending judicial review is a matter which properly may be left to the court having jurisdiction. Considering all the circumstances, including the substantial losses being incurred by the applicant from continued operations and the absence of any offer to indemnify it against additional losses, we are of the view that it would be unreasonable for us to further defer the effective date pending the making of financial arrangements and the determination of a price for any of the property sought to be acquired. This proceeding has been pending for 4 years, and more than 5 months have elapsed since issuance of our certificate and order. Nevertheless, we are not apprised of any substantial steps being taken toward the making of necessary financial arrangements to purchase all or a part of the line, nor are we informed that any of the protestants have any intention of making an offer therefor. It is not necessary that the price be definitely ascertained before an offer is made. Under the condition imposed, applicant will be obligated to sell at a price "not less than the net salvage value." The price subsequently may be determined by arbitration. The condition previously imposed is supplemented to provide that, if agreement respecting the price cannot be reached by the applicant and a person, firm, or corporation offering to purchase all or part of the property, the amount payable shall be subject to determination by an arbitration committee selected in the following manner: One to be selected by the applicant and the person offering to purchase the property, respectively, and these two shall endeavor by agreement within 10 days after their appointment to select a third member or to select some person authorized to name the third member. Upon their failure to agree, the third member may be named by the Chairman of this Commission. A decision of the majority of the committee shall be required, and such decision shall be final and conclusive. Fees and expenses of the third member, and the

expenses of the committee, shall be borne equally by the parties. All other expenses shall be paid by the party incurring them, including the compensation of the member selected by such party.

Contentions of the petitioners not specifically discussed herein have been considered and found to be without merit.

Subject to the condition respecting sale of the property, supplemented in the respects described above, we affirm our prior finding that the present and future public convenience and necessity permit abandonment by the Chicago, North Shore and Milwaukee Railway of its entire line of railroad in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill.

An appropriate order will be entered.

COMMISSIONERS FREAS AND HERRING concur in the result.

COMMISSIONER TUCKER did not participate.

317 I.C.C.

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No. 937

In the Supreme Court of the United States

OCTOBER TERM, 1962

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and NORTH SHORE COMMUTERS ASSOCIATION,
APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO NORTH SHORE & MILWAUKEE RAILWAY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the Interstate Commerce Commission moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court, which dismissed appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order granted the Chicago, North Shore & Milwaukee Railway ("North Shore") a certificate of public convenience and necessity permitting abandonment of its entire line of railroad extending between Milwaukee, Wisconsin, and Chicago, Illinois.

On June 25, 1958, the North Shore applied to the Commission under Section 1(18-20) of the Interstate Commerce Act, 49 U.S.C. § 1(18-20), for a certificate of public convenience and necessity permitting abandonment. Appellants filed motions to dismiss, challenging the jurisdiction of the Commission. Appellants asserted that the North Shore was not subject to Commission regulation as to abandonment by virtue of the exemption of "street, suburban, or interurban electric railways which are not operated as a part of parts of a general steam railroad system of transportation" in Section 1(22) of the Act, 49 U.S.C. § 1(22).

On May 4, 1960, the Commission issued its interim report, 312 I.C.C. 99 (extract appears at J.S. xxx-xxxii). The Commission overruled the motions to dismiss, but determined to defer action on the application for a trial period of one year to afford the North Shore, in cooperation with local groups, an opportunity to explore all possibilities for profitable operation.

On May 10, 1962, the Commission issued its report after further hearing, 317 I.C.C. 191 (extract appears at J.S. xxvii-xxviii). The Commission found that "the present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation . . .", and that the present and future convenience and necessity permit the abandonment by the North Shore of its entire line of railroad. (317 I.C.C. 200, J.S. xxviii). The Commission directed that an appropriate certificate and order be issued,[1] to take effect and be in force from and after 35 days from the date of service.[2]

On October 15, 1962, the Commission issued its report on reconsideration, 317 I.C.C. 363 (extract appears at J.S. xix-xxvi). The Commission considered and rejected appellants' contentions that the North Shore was an interurban electric railway within the meaning of Section 1(22), and that, even if the Commission had jurisdiction to grant a certificate to the North Shore permitting abandonment,

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[1] The certificate granted by the Commission was made subject to a condition respecting sale for continued operation (J.S. xxix). This condition is not at issue in this proceeding.

[2] The effective date of the Commission's certificate and order was extended by the Commission until November 2, 1962. (J.S. xxvi-xxvii). The North Shore voluntarily postponed abandonment until after decision had been rendered by the district court. The North Shore has filed with the Commission revocation of concurrences and cancellation of appropriate tariffs bearing the effective date for cessation of operations of January 21, 1963.

such certificate must be limited to interstate commerce.

The three-judge district court determined that appellants' complaint should be dismissed because the Commission had jurisdiction to authorize abandonment by the North Shore of its entire line of railroad, both as to interstate and intrastate commerce, and that the evidence justified the Commission's issuance of such an abandonment certificate.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court. Appellants have not challenged in this appeal the Commission's determination that a certificate permitting abandonment should be issued because present revenues have not been, and future revenues will not be, sufficient to cover the cost of the North Shore's continued operation with sufficient maintenance of facilities necessary to safety of operation. The district court noted that it would be hard to see how a contrary contention could very well be made for the "outstanding single fact supporting this conclusion" is that the North Shore for a thirty-year period from 1932-1961, except for the World War II years, has sustained large operating losses. (J.S. xvi-xvii).[3]

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[3] The North Shore sustained the following operating deficits during the years 1955 to 1961. (J.S. xvii):

"Year	Operating deficit
1955	$661,874
1956	515,067
1957	603,413
1958	462,615

1. The district court and the Commission were clearly correct in determining that the North Shore did not fall within the exemption of Section 1(22) as an interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation. Appellants contend that the decision in *United States* v. *Chicago, N. S. & M. R. Co.*, 288 U.S. 1 (1933) is controlling as to the status of the North Shore railroad today. The Commission correctly found that this decision was not controlling because the evidence of record in the present proceeding indicated that the present day status-determining characteristics of the North Shore railroad are not those of an exempt railway within the meaning of Section 1(22).[4]

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[3] (Cont'd)

Year	Operating deficit
1959	398,835
1960	468,239
Ended May 31, 1961	539,872"

[4] Thus, the Commission stated:

"In disposing of a similar contention that applicant is an electric interurban railway not operated as a part of a general railroad system of transportation, our interim report of May 4, 1960, 312 I.C.C. 99, referred to our earlier decision in *Chicago, N. S. & M. Ry. Abandonment*, 290 I.C.C. 765, wherein the same question was presented. * * *

The physical characteristics of applicant remain essentially unchanged since our decision in *Chicago, N. S. & M. Ry. Abandonment, supra.* It continues to engage in the transportation of both passengers and property across the Wisconsin-Illinois State line. While it is principally a passenger carrier, we found in the cited decision (p. 769) that freight accounted for approximately 16.5 percent of its total operating revenues in 1953. The record herein discloses that in 1960 freight traffic accounted for about 14.6 percent of its

As the district court pointed out, the determination of whether the North Shore falls within the exception contained in Section 1(22) involves only the question of whether the facts have been properly interpreted and whether they support the Commission's conclusions (J.S. xiii). Noting that appellants do not dispute the underlying facts as found by the Commission, the district court concluded that the Commission, "has upon an abundance of evidence correctly determined that the North Shore does not fall within the exception and is therefore subject to Section 1(18) of the Act." (J.S. xiii).[5]

Appellants' reliance on this court's decision in *United States* v. *Chicago N. S. & M. Railroad*, 288

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* (Cont'd)

total revenues. Practically all of the freight handled is interchanged with other railroads. Applicant's line is physically connected at six different points with one or more interstate carriers, namely the Elgin, Joliet & Eastern Railway, the Chicago, Milwaukee, St. Paul and Pacific Railway, the Minneapolis, St. Paul and Sault Ste. Marie Railroad, and the Chicago and North Western Railroad, and it continues to participate in more than 1,000 tariffs with class I trunk line carriers. We need not elaborate further. Other status-determining characteristics of applicant detailed in our decision cited above continue to be present. * * *" (J.S. xix-xx).

[5] The district court, after quoting and discussing *United States* v. *Idaho*, 298 U.S. 105 (1936), and *City of Yonkers* v. *United States*, 320 U.S. 685 (1943), concluded that the scope of judicial review as to this question is settled: "although this Court is not bound by the determinations of the Commission and that the doctrine of 'substantial evidence' is not specifically applicable, nevertheless great weight must be given to the determination of the Commission in an order such as this in which its special competence is clearly recognized." (J.S. xii). Appellants do not challenge the district court's statement of the scope of judicial review (Cf. J.S. 15).

U.S. 1 (1933) is misplaced. That decision does not constitute an authoritative holding that the North Shore is an electric interurban railway, but rather rests on equitable grounds which required a holding that the North Shore was exempt from the provisions of Section 20a of the Interstate Commerce Act. Section 20a contains a similarly worded proviso exempting interurban electric railways from Commission jurisdiction over the issuance of securities. The court reviewed the physical characteristics of the North Shore, and also noted the consistent administrative construction of the North Shore as an interurban electric railway under Section 20a by the Commission for the preceding 10 years. The court stated that although "the proper classification of the railway is not free from doubt" (288 U.S. 1, 13), it would decline to uphold an administrative construction contrary to one which had been relied upon by the company and its officers in issuing securities of which over $38 million were then outstanding.

In *Sprague* v. *Woll*, 122 F. 2d 128 (C.A. 7, 1941), cert. denied, 314 U.S. 669, the Court of Appeals, in affirming a Commission holding that the North Shore was not an exempt interurban electric railway under the Railway Labor Act, and Railroad Retirement Act of 1937, distinguished the 1933 decision of this court in the *North Shore* case pointing out (122 F. 2d at page 131):

> * * * It appears obvious from a reading of that decision that the Court, while entertaining serious doubts of the correctness of the determination if presented as a matter of first impression,

> was moved by equitable considerations to resolve that doubt in favor of the lower court decision under the facts presented. * * *

This Court has called attention to the fact that the same phraseology exempting electric interurban railways is used in other sections of the Act, as well as Section 1(22), but it is so used with other purposes in view. *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, 286 U.S. 299, 312 (1932). ". . . a determination under one statute need not necessarily be res judicata when the same question arises under identical words of another statute." Davis, *Administrative Law*, Vol. 2, ¶ 18.04, pp. 576-578 (citing the *North Shore* cases as an example).

The decision cited by appellants, *In re Chicago, N. S. & M. R.*, 131 F. 2d 458 (C.A. 7, 1942), cert. denied, 318 U.S. 768, as the district court determined, interpreted Section 77 of the Bankruptcy Act, which differs materially from the Interstate Commerce Act in both its underlying purpose and in its jurisdictional tests. (J.S. ix).

As the district court pointed out, it is apparent from the decisions following *United States* v. *Chicago, N. S. & M. R. Co.*, 288 U.S. 1 (1933), that exemptions similar to Section 1(22), which are found in other provisions of the Act, or in other Acts, allow different interpretations, depending on the purpose of the Act, the underlying issues, and the particular facts of the case. (J.S. ix).

2. The district court and the Commission were clearly correct in determining that the Commission's authority was not limited to the grant of a certificate

to abandon operations in interstate commerce. Appellants' contention that the Commission's authority does not extend to intrastate commerce rests upon the unsupported assumption that the North Shore's operations within the states of Wisconsin and Illinois can be segmented from its interstate operations. The Commission found that the North Shore's intrastate and interstate operations are co-mingled and are being conducted as part of the same service. (J.S. xxiii). The district court noted its agreement with the Commission's "well supported findings that the systemwide operations of the North Shore are not capable of a practical disjunction . . .". (J.S. xiv).

Where a railroad crosses a state line and carries both intrastate and interstate commerce over the same tracks in an integrated system of operations so that "[T]he two services are inextricably intertwined," the Commission has exclusive jurisdiction over the operations of the railroad in both interstate and intrastate commerce. *Colorado* v. *United States*, 271 U.S. 153, 164 (1926). Cf. *Texas* v. *Eastern Texas Railroad Co.*, 258 U.S. 204 (1922).

The commerce power is not confined in its exercise to interstate commerce; it extends to those intrastate activities which affect interstate commerce in a substantial way so that regulation of them is appropriate to the power of Congress over interstate commerce. *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Transit Commission* v. *United States*, 284 U.S. 360 (1932).

The Commission found that there would be a burden upon interstate commerce even if the North Shore were permitted to operate solely in intrastate commerce because of the obviously insufficient revenues to permit continued safe operations, and the effect upon passenger patronage of the Chicago & North Western Railway Company and of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, whose lines closely parallel those of the North Shore.[6] (J.S. xxiii-xxvi). The district court concluded that these findings were supported by the evidence. (J.S. xiv).

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[6] The North Western's tracks are located slightly west of and generally parallel to the main line of the North Shore. The Milwaukee's line is located slightly east of the North Shore's line, parallels it in part, and is separated by distances ranging from 0.25 mile to 2.4 miles. (J.S. xxiv). (These three lines are pictured on the fold-out map between J.S. 8 and J.S. 9).

The Commission found that the North Western had spent considerable sums for new cars and advertising to increase the patronage on its Milwaukee-Chicago trains, but that it sustained deficits amounting to approximately $2 million on these operations in 1958-1959. (J.S. xxiv). The North Western has announced that discontinuance of the North Shore operations has brought a substantial number of new riders, and that the North Western plans to immediately purchase 10 additional bi-level coaches for suburban service in the Chicago area, at a cost of approximately $1.6 million. *Traffic World*, Vol. 113, No. 7, February 16, 1963, page 30.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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April 17, 1963

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OCTOBER TERM, 1962.

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(Plaintiffs) Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY,
(Defendants) Appellees.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

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THE DONNELLEY-GARDEN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 937.

STATE OF ILLINIOS, ILLINOIS COMMERCE COMMISSION, and NORTH SHORE COMMUTERS ASSOCIATION,
(Plaintiffs) Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY,
(Defendants) Appellees.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

This is an appeal from the judgment of a three-judge District Court dismissing a complaint seeking to set aside and to enjoin enforcement of an order of the Interstate Commerce Commission authorizing Chicago North Shore & Milwaukee Railway (herein called the "North Shore") to abandon its entire electric railroad.

The attack on the validity of the Interstate Commerce Commission's order is based upon the following propositions:

1. That (as decided in *United States* v. *Chicago N. S. & M. R. R.*, 288 U. S. 1) the North Shore's railroad

is an interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation, and hence is excluded by Section 1 (22) of the Interstate Commerce Act (Title 49 USC) from jurisdiction of the Interstate Commerce Commission to authorize abandonment; and

2. That even if (as we deny) the North Shore's railroad is not excluded from the jurisdiction of the Interstate Commerce Commission by Section 1(22) of the Interstate Commerce Act, the Commission has no jurisdiction to authorize abandonment of the separate intrastate service of the North Shore's railroad.

Appellees, Interstate Commerce Commission and Chicago North Shore & Milwaukee Railway (the "North Shore") have filed separate motions to affirm the judgment appealed from, contending that the above propositions "present no substantial question warranting plenary consideration by the Court."

We submit that that contention cannot be sustained.

I.

THE QUESTION AS TO WHETHER THE NORTH SHORE'S RAILROAD IS AN "ELECTRIC INTERURBAN RAILWAY" OF THE TYPE EXCLUDED BY SECTION 1(22) OF THE INTERSTATE COMMERCE ACT FROM THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION TO AUTHORIZE ITS ABANDONMENT.

The primary question in this case is whether the Interstate Commerce Commission had jurisdiction to authorize abandonment by the North Shore of its railroad.

Paragraph (18) of Section 1 of the Interstate Commerce Act (Title 49 USC) provides that no carrier subject to the

Act shall abandon any portion of a line of railroad "unless and until there shall have been obtained from the Commission a certificate that present or future public convenience and necessity permit of such abandonment."

Paragraph 22 of Section 1 of the Act provides that the jurisdiction of the Commission to authorize abandonment "shall not extend to * * * *interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.*"*

If the North Shore's railroad is of the type defined in the italicized portion of the foregoing quotation from Section 1(22), the Interstate Commerce Commission had no jurisdiction to authorize its abandonment, and the Commission's order purporting to authorize abandonment is void. It would then follow that under Paragraph (20) of Section 1 of the Interstate Commerce Act and Section 2325 of the Judicial Code (Title 28) the order of the Commerce Commission purporting to authorize abandonment may be set aside and the North Shore may be enjoined from abandoning its railroad pursuant to that order.

A.

The Controlling Effect of the Decision of the Supreme Court in United States v. Chicago N. S. & M. R. R., 288 U. S. 1.

1.

The Grounds of the Decision—Irrespective of "Administrative Construction."

In *United States* v. *Chicago N. S. & M. R. R.*, 288 U. S. 1 (referred to in the Jurisdictional Statement and in this brief as "the prior North Shore Case") this Court construed a like clause in Paragraph (1) of Section 20a of the

* Note: Italics are ours, here and elsewhere, unless otherwise noted.

Interstate Commerce Act, excluding from the jurisdiction of the Commission over security issues of an interstate carrier that is classified as:

> "* * * a street, suburban, or interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation."

The language of the exclusion clause is thus identical (except for substitution of the singular for the plural) with that in Paragraph (22) of Section 1 here involved.

And the purpose of each exclusion clause is the same—i.e., to exempt from the jurisdiction of the Interstate Commerce Commission, interurban electric railways of the type specified.

Where the same words or phrases are used with a similar purpose in different parts of the same statute, they will be presumed to have the same meaning and application.

> *Folker* v. *Johnson*, 230 Fed. 2d (CA 2) 906 (908).
> *Schooler* v. *United States*, 231 Fed. 2d (CA 8), 560 (563).
> *Com. of Int. Rev.* v. *Ridgeway's Estate*, 291 Fed. 2d (CA 3) 257 (259).

As was said in the last cited case (291 Fed. 2d at p. 259):

> "Where a word or phrase is used in different parts of the same statute it will be presumed to have the same meaning throughout * * * [citing cases] * * * The need for uniformity becomes more imperative where the same word or term is used in different sections that are similar in import and content."

In the opinion in the prior *North Shore* case (288 U. S. at p. 10) in distinguishing *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299 (construing the exclusion clause in Section 1(22) of the Interstate Commerce Act and holding that clause not to be applicable to

the Piedmont Railroad), this Court noted that the exclusion clause in Section 1(22) is "couched in the same language" and therefore is subject to the same construction as the exclusion clause in Paragraph 1 of Section 20a, in issue in the prior *North Shore* case. The *Piedmont* case was distinguished wholly on the ground that the Piedmont Railroad had many freight cars and derived about 95% of its income from freight, while (as the Court said 288 U. S. at page 10) the North Shore's railroad is:

> "A typical example of an interurban electric line for passenger service which has developed in addition such freight traffic as could advantageously be conducted without interfering with the performance of the main purpose of the carrier."

The Court comments as follows on the similarity and difference between the clauses in the three separate sections of the Act excluding certain types of interurban electric railways from the jurisdiction of the Interstate Commerce Commission (288 U. S. at p. 11):

> "Interurban electric railways are expressly saved from the requirements of Paragraphs 1(18) to (21) inclusive, 15a and 20a. The language of the excepting clauses in the first and third instances is identical except for the use in one case of the singular and in the other of the plural number. That applicable to 15a, which is the section providing for fixing rates to yield a fair return, and for recapture, differs in substance from the two others and is: 'excluding . . . (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight*. . .'" (Italics are the Court's.)

The Court points out (288 U. S. pp. 11-12) that the Interstate Commerce Commission had made repeated recommendations to Congress that the exclusion clause in Section 20a(1) and Section 1 (22) be amended by excepting

therefrom electric railroads "*engaged in the general transportation of freight*" but that Congress had refused to make that amendment. In fact, as the Court pointed out, the federal authorities had, in effect, held that the North Shore was within the exception in Section 15a from jurisdiction of the Interstate Commerce Commission because it was an interurban electric railroad of the type specified and because it was "not engaged in the general transportation of freight."

The court, after a full review of the facts—and irrespective of "administrative construction" held (288 U. S. at pp. 10-11) that "as a matter of first impression" the Court "would be inclined to hold Section 20a inapplicable"—i.e., that (independently of administrative construction) the North Shore's railroad is within the clause excluding interurban electric railways from the jurisdiction of the Commission.

The Court then reviewed the past practice of the North Shore in going to the State Commission for authority to issue securities—on the assumption that the North Shore's electric railroad was within the clause excluding the Interstate Commission from jurisdiction—and emphasized the fact that the Interstate Commission had not objected to that practice. The Court concluded, therefore, that "administrative construction" of the exclusion clause confirmed "the first impression" that the North Shore's railroad was an "interurban electric railway" excluded from jurisdiction of the Interstate Commerce Commission.

2.

The Effect of "Administrative Construction."

The Appellees, in their motions to affirm, seek to distinguish the decision in the *prior North Shore* case (288 U. S. 1) on the ground that it was based on "equitable" consider-

ations—on a sort of estoppel arising out of the fact that securities of a larger face value had been theretofore issued under state authority, and without objection of the Interstate Commerce Commission.

As appears from the above summary of this Court's opinion in the *prior North Shore* case, it is apparent that the decision would have been the same irrespective of "administrative construction."

Furthermore, if "administrative construction" of Section 20a of the Interstate Commerce Act requires a decision that the North Shore is "an interurban electric railway not part of a general steam railroad system of transportation," and hence excluded from jurisdiction of the Interstate Commission, it must follow that a like construction must be given to the same exclusion clause in Section 1(22) of the Act. The North Shore can hardly change its character back and forth according to the forum in which it desires to prosecute its particular action.

The "administrative construction," as indicated by the North Shore's actions prior to the institution of the 1954 application for leave to abandon the Shore Line, is in accord with the decision that the North Shore is within the clause excluding it from the jurisdiction of the Interstate Commerce Commission.

In 1948, when the first application was made for leave to abandon the Shore Line, the North Shore filed its application with the Illinois Commerce Commission and resisted a contention that the Interstate Commerce Commission had jurisdiction.

In 1953, when the North Shore went through its reorganization and "spun off" a large part of its assets to a new holding company (now known as "The Susquehanna Corporation") the application for approval of the reorganization was made to the Illinois Commission.

It was not until 1954 when the second application for leave to abandon the Shore Line was filed that the North Shore shifted its position and filed the application with the Interstate Commission—as well as with the Illinois and Wisconsin Commissions.

And, as appears from the report of the division of the Interstate Commerce Commission that decided the 1954 "Shore Line" abandonment case (290 ICC at p. 798) one of the three Commissioners of the division dissented on the ground that the Interstate Commerce Commission did not have jurisdiction—citing the prior *North Shore* case —288 U. S. 1.

3.

There Has Been No Change in the Character of The North Shore's Railroad Service; the Decision in the Prior North Shore Case Is as Apt Today as When Rendered in 1932.

The principal ground upon which Appellees seek to evade this Court's decision in the *prior North Shore* case is that there is an interchange of freight by the North Shore's railroad with various connecting interstate carriers.

But that same condition existed when the *prior North Shore* case was decided in 1932. In fact, at that time the North Shore had 114 freight cars of its own and 22% of its revenue was derived from freight. (288 U. S. at p. 9.) During the period involved in the instant case, the North Shore owned no freight cars and its freight revenue had dropped to 14% of the total revenue. No freight is handled at either the Chicago or Milwaukee Terminals and the passenger cars are all of the type that can operate on the elevated tracks in Chicago and over streetcar tracks in Milwaukee.

The following statement in the opinion in the *prior North Shore* case (288 U. S. pp. 9-10) is as apt today as in 1932:

> "Locomotives are not employed in the passenger service, the cars having installed electrical equipment, and being somewhat shorter and narrower than standard passenger railroad coaches. Freight is hauled by electric locomotives. * * * The company maintains no facilities for receipt or delivery of carload freight at its terminal in Chicago and Milwaukee, and cannot accomplish inter-change of such freight at either, *connections for this purpose being outside those cities.*
>
> The railroad was constructed to afford a fast electric passenger service between Chicago and Milwaukee and suburban passenger service into and out of Chicago. The freight business is subsidiary to this primary function, and is not fairly comparable to that ordinarily transacted by a standard steam railroad. Passenger traffic, whether measured by car service or by gross earnings, heavily preponderates over interline freight business. The main terminals serve only the passenger and merchandise freight traffic.
>
> We have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier."

As appears from the above quotation, the interchange of freight with other railroads, at connecting points outside of the City limits, was then in effect as it is now. But, as the Court stated, such freight handling was [as it is now] incidental in character, compared with the primary purpose of the North Shore—i.e., to operate a "typical * * * interurban electric line for passenger service," with freight service as a minor side line.

It cannot now be held that this incidental freight business destroys the character of the railroad as "an interurban electric railway" without wholly disregarding the decision of this Court in the *prior North Shore* case.

B.

Comments on Authorities Relied on by Appellees.

The principal case relied on by Appellees in support of their argument on the jurisdictional question is *Sprague* v. *Woll*, 122 Fed. 2d (CA 7) 128. That case involved a question as to whether the North Shore's railroad is one of the carriers exempted from the application of the Railway Labor Act by the following provision of that Act. (122 Fed. 2d at p. 129):

> "* * * the term 'carrier' shall not include any street, interurban or suburban electric railway, unless such railway is operating as a part of a general steam railroad system of transportation, *but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.*"

The provision quoted thus excepts from the exemption granted to certain interurban electric railways: (1) interurban electric railways that are "part of *a* [*i.e.*, a particular] steam railroad system of transportation," and (2) interurban electric railways that are "part of *the* [*i.e.*, the country-wide] general steam-railroad system of transportation."

The case was decided on the ground that the North Shore's railroad (although not a part of "*a* steam railroad system of transportation") could be considered to be "operating as a part of *the* general steam railroad system of transportation," (122 Fed. 2d at p. 130)—and hence that the decision in the *prior North Shore* case was not in point.

In distinguishing the *prior North Shore* case, the Court in *Sprague* v. *Woll* rests its conclusion on a misinterpretation of the following statement of this Court in the *prior North Shore* case (288 U. S. at pp. 10-11):

> "As a matter of first impression we [the Court] should, though the decision is not free from difficulty, be inclined *to hold Section 20a inapplicable.*" [i.e., to hold the clause exempting interurban electric roads from the Interstate Commerce Commission's jurisdiction *to be applicable.*]

The Court of Appeals, in *Sprague* v. *Woll*, in commenting on the foregoing passage from the Supreme Court's opinion, said (p. 131):

> "It appears obvious from a reading of that decision that the Court, *while entertaining serious doubts of the correctness of the determination if presented as a matter of first impression*, was moved by equitable considerations to resolve that doubt in favor of the lower court decision under the facts presented."

As appears from the foregoing quotation, the Court, in *Sprague* v. *Woll*, in commenting on the Supreme Court's opinion in the *prior North Shore* case, treated it as if the Supreme Court had held that "as a matter of first impression" the Court deemed the *exemption* to be *inapplicable*, and Section 20a to be *applicable*, which is exactly contrary to what the Court held. There was thus, in *Sprague* v. *Woll*, a complete misinterpretation of the Court's opinion in the prior *North Shore* case.

Sprague v. *Woll* was discussed at length and distinguished by the same Court of Appeals in *In Re Chicago N. S. & M. R. Co.*, 131 Fed. 2d (CA 7) 458 (Cer. Den. 318 U. S. 768), referred to at pages 15-16 of the Jurisdictional Statement. In that case, in holding the North Shore's railroad to be within a provision of Section 77 of the Bankruptcy Act (applying to railroads) excluding therefrom "interurban electric railroads which are not part of a general railroad system of transportation," or which have less than half their business in freight, the Court said (pp. 460-1):

"We think there can be no question but that this Road is not 'operating as a part of a general steam-railroad system of transportation.' * * *

In *Sprague* v. *Woll, supra*, the Commission had held that the Road was part of *the* general steam railroad system of transportation, on the basis of the characteristics referred to above, including a substantial revenue from the carriage of freight in standard equipment. In view of this fact, we did not consider it necessary, in reviewing the case, to discuss the preceding limitation on the exemption contained in the Labor statutes 'unless such railway is operating as a part of *a* general * * system * * *,' although the Commission and the United States Attorney had discussed the distinction inherent in the two phrases. In the case now before us, however, a different exclusion from the exemption is involved. Since the Road is not eligible for reorganization under Section 77 *if it is a street, a surburban or interurban electric railway, not operated as a part of a general railroad system of transportation or* which does not derive more than 50% of its operating revenue from the transportation of freight in standard steam railroad freight equipment, it becomes necessary for us to determine the meaning of the first phrase. We agree with the District Court that 'the use of the word "a" before the words "general railroad system" * * * clearly denotes that Congress there contemplated some *particular* operating railroad system exercising management, control and supervision over a particular street, suburban or interurban.' Hence in view of the evidence that no such control or supervision exists, the Road is not eligible for reorganization under Section 77 unless it derives more than 50% of its revenues from transportation of freight.'"*

Furthermore, the Interstate Commerce Act contains no provision such as that in the Railroad Labor Act (under construction in *Sprague* v. *Woll*) conferring on the Inter-

* Note: The italics in the foregoing quotation and the asterisks denoting omissions in subquotes are the Court's.

state Commerce Commission jurisdiction to determine whether or not a carrier is within its jurisdiction, so long as there is "substantial evidence" to justify the finding.

The determination as to whether a railroad or part thereof is exempted by Section 1(22) of the Interstate Commerce Act from the jurisdiction of the Interstate Commerce Commission "is a mixed question of fact and law left by Congress to decision of a Court—not to final determination of either the federal or a state commission."

United States v. *Idaho*, 298 U. S. 105 (109).
Yonkers v. *United States*, 320 U. S. 685 (689).

II.

EVEN IF (AS WE DENY) THE NORTH SHORE'S RAILROAD IS NOT EXCLUDED FROM THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION BY SECTION 1 (22) OF THE INTERSTATE COMMERCE ACT, THE QUESTION REMAINS AS TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION TO AUTHORIZE ABANDONMENT OF THE SEPARATE INTRASTATE SERVICE.

The argument on this point in Appellees' Motions to Affirm rests on two propositions:

1. That the interstate and intrastate services are "inextricably intertwined" or "integrated and commingled" so that abandonment of the interstate service necessarily requires simultaneous abandonment of the intrastate service; and

2. That North Shore's intrastate service competes with the passenger service of the North Western and Milwaukee railroads; that continuance of that intrastate service therefore casts a burden on the interstate commerce of those railroads; and that jurisdiction is thus conferred on the Interstate Commerce Commis-

sion to remove the burden by authorizing abandonment of the intrastate service of the North Shore.

Neither proposition is sound.

A.

The Interstate and Intrastate Services of the North Shore's Railroad Are Severable and Are Not "Inextricably Intertwined."

The statements in Appellees' motions to affirm that the intrastate and interstate services of the North Shore's railroad are "inextricably intertwined" or "integrated and commingled" rests on assertion only.

As appears from the map opposite page 9 of the Jurisdictional Statement, the intrastate service between Chicago and Mundelein has its northwestern terminus on a separate branch not used at all by interstate trains.

The intrastate trains to Waukegan and Zion pass over tracks also used by the interstate trains; but their terminus is in Waukegan or Zion and they do not affect interstate traffic.

The division of trains and passenger traffic between separate interstate and intrastate trains is as follows (Ex. 74, C-91):

	Trains 5/31/60-5/31/61		Number of Passengers
Interstate	Number	Per Cent	Per Year (1958)
Between Chicago and North Chicago Junction and Milwaukee	48	47.5%	2,601,908
Intrastate			
Between Chicago and Waukegan or Zion	21	20.8%	1,175,692
Between Chicago and Mundelein	32	31.7%	1,374,095
Total Intrastate	53	~~52.5%~~ 52.5%	2,549,787

For the 12 months ending May 31, 1961, due to a rapid increase in population of the suburban areas served, the passenger traffic on the intrastate trains had increased so that it exceeded that on the interstate trains, not only as to number of trains, but strikingly, as to revenue. The 12-month period ending May 31, 1961 was divided between interstate and intrastate traffic as follows (Ex. C-14):

	Amount	Per Cent
Revenue from Interstate Traffic	$1,412,012	30.73%
Revenue from Wisconsin Intrastate Traffic	$ 351,199	7.49%
Revenue from Illinois Intrastate Traffic	$2,923,126	62.38%

The separate intrastate service is therefore an important part of the business of the North Shore's railroad.

It was treated as separate by the North Shore when it filed the application for authority to abandon—not only with the Interstate Commerce Commission, but also with the State Commissions of Illinois and Wisconsin. The Illinois Commission, acting on the North Shore's application, by order entered after a full hearing, denied the application. No appeal was taken from that order and it is final.

In the original report of the Examiner of the Interstate Commerce Commission in this case, he recommended (assuming jurisdiction in the Commission) that abandonment be authorized only "as to interstate and foreign commerce."

If the order of the Interstate Commerce Commission should be held valid insofar as it authorizes abandonment of interstate commerce, there will be no interstate commerce left to be adversely affected by continuance of the intrastate service. There can, therefore, be no basis for a contention that the Interstate Commerce Commission has

jurisdiction over the separate intrastate service because it casts a burden on the interstate commerce of the railroad.

Texas v. Eastern Texas R. R. Co., 258 U. S. 204 (217-218).

Colorado v. *United States*, 271 U. S. 153 (169-170).

B.

PUBLIC CONVENIENCE DOES NOT REQUIRE ABANDONMENT OF THE NORTH SHORE'S INTRASTATE SERVICE ON THE GROUND THAT ITS CONTINUANCE CASTS AN UNDUE BURDEN ON THE INTERSTATE SERVICE OF THE NORTH WESTERN AND MILWAUKEE RAILROADS.

The North Shore's railroad furnishes a unique service between northern and northwestern suburban areas of Chicago and the Chicago Loop and adjoining areas of the City to the north and south served by the elevated and subway trains.

The North Western and Milwaukee Railroads furnish no comparable service.

The tabulation at page 20 of the Jurisdictional Statement, setting forth the comparative patronage of the North Shore, North Western and Milwaukee Railroads from competing stations, shows the great preponderance of the passenger traffic on the North Shore, as compared with the passenger traffic from competing stations on the North Western and Milwaukee Railroads.

The North Western and Milwaukee Railroads were not parties to the proceedings before the Interstate Commerce Commission.

The evidence as to comparative patronage shows that "public convenience and necessity" will be much better served by continuance of the North Shore's service than by requiring its discontinuance for the benefit of competing lines which do not, and cannot, render like service.

In fact, the evidence as to the rapidly increasing population in the suburban area served indicates that more, rather than less, mass transportation will be needed.

III.

THE ALLEGED OPERATING LOSSES.

In the North Shore's motion to affirm (although not in the motion of the Interstate Commerce Commission) emphasis is again placed on the alleged operating losses of the North Shore's railroad.

The existence, or non-existence, of operating losses has no bearing on the jurisdictional issue here involved. If the Interstate Commerce Commission has no jurisdiction, it cannot grant the relief asked. Congress has elected to leave to the state authorities the power and duty to pass on the questions raised and to grant any relief that may be called for.

There is, however, a substantial question on the record as to whether the losses could not have been eliminated by improved operating methods and the fixing of adequate fares. According to the testimony of Protestants' (Appellants', here) expert witnesses, a saving of approximately $439,000 per year could have been effected by improved operating methods and (except for a questionable item of "deferred maintenance") the loss could have been entirely eliminated. (Appendix IV to Interstate Commerce Commission Report of May 10, 1962, 317 I.C.C. at page 203, set forth at page numbered 203 in the Appendix to the North Shore's motion to affirm.)

When the abandonment of the Shore Line was authorized by the Interstate and Illinois Commerce Commissions, after joint hearings in 1954, assurances were given by the officers of the North Shore that the remainder of the railroad could be operated at a profit.

At the same time, however, a report was prepared by Charles S. Leonard, then of Duff, Anderson & Clark, financial analysts, and later president of the Susquehanna Corporation and the North Shore, which recommended disposal of the remaining railroad properties after a five-year interval, irrespective of profit or loss, so as to provide a "tax shelter of something over $20,000,000" (based on "paper" losses from book values of predecessor corporations) to apply against income of the holding company from its other profitable ventures.

The plan proposed—and meticulously followed—is summarized in the following extracts from the Duff, Anderson & Clark Report:

> "If some or all of the railroad operations could be disposed of through abandonment and/or sale, considerable cash would be made available to the parent by freeing the working capital and by proceeds by disposition. More important, however, is the immense tax shelter inherent in the railroad subsidiary because of losses which are certain to be realized upon disposition of its fixed assets." (Ex. 112, p. 52.)
>
> "Chicago, North Shore and Milwaukee Railway regularly reports the very substantial net losses. These are after heavy depreciation charges, with the result that the cash losses of that company are not great, and are more than offset by the cash gains from the earnings and depreciation of other members of the group." (Ex. 112, p. 6.)
>
> "As we stated earlier, the ultimate disposition of the remaining railroad assets and operations presents a number of problems which cast some doubt on the likelihood that it can ever be accomplished. Moreover, it would not be desirable to attempt it prior to the time that the Company had utilized all of the tax shelter to be made available by other means and achieved the strongest possible capital position." (Ex. 112, p. 26.)
>
> "We have assumed that the remaining railroad

assets could be sold for approximately 10% of their net book value or some $2,350,000,* thus creating an additional loss [i.e., a "tax shelter"] of more than $21,000,000." (Ex. 112, p. 54, par. 16.)

"We have recommended that the Company make an effort to dispose of all of its railroad assets and operations, but we believe that the disposition of the railroad assets remaining after abandonment of the shore line should be postponed until the then existing tax shelter has been absorbed and the Company is in a capital position to take advantage of the new and larger tax shelter that would stem from the disposition of the rest of the railroad assets. On the assumption that this could be accomplished, we have assumed that it would take place at the end of four and a fraction year period referred to just above." (Ex. 112, p. 54, par. 15.)

The application to the Interstate Commerce Commission for authority to abandon the remainder of the railroad was timed to meet the "four and a fraction year" interval recommended in the last-above quotation from the Duff, Anderson & Clark Report. It is apparent that its primary purpose was to effect the additional tax shelter of $20,000,000 or more to be applied against the Susquehanna Corporation's taxable income for the ensuing five years.

Furthermore, there was testimony that Mr. Mason, now president of the North Shore, stated that "If he had a free hand he could operate the railroad at a profit," (Rec. 3744-5) and Mr. Mason testified that under those circumstances "he might be able to do more with it." (Rec. 4071-

* Note: The motion of the North Shore to affirm asserts (p. 2) that "no offer to purchase, *complying with the Commission's order*, was ever made." The inference, apparently intended, that no offer to purchase at a fair salvage value was made, is contrary to fact. Two such offers were made by a responsible party intending to continue operation of the railroad, but both offers were rejected.

2.) And the testimony of transportation experts for the present Appellants supports those conclusions.

The question as to the presence or absence of losses, and as to whether they could have been avoided is, however, not relevant on this appeal.

The cases cited in the North Shore's motion to affirm as to the application of the 14th Amendment are not apposite. No question as to the 14th Amendment was, or could be, raised before the Interstate Commerce Commission or in the District Court in this case.

For the reasons set forth in the Jurisdictional Statement (pp. 22-24), as supplemented by the foregoing Brief, we submit that the questions presented by this appeal are substantial and of such serious import as to require plenary consideration with briefs on the merits and oral argument for their determination; that Appellees' motions to affirm should be denied; and that probable jurisdiction should be noted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 937

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND NORTH SHORE COMMUTERS ASSOCIATION,

(Plaintiffs) Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY,

(Defendants) Appellees.

PETITION FOR REHEARING.

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY,

(Defendants) Appellees.

PETITION FOR REHEARING.

Appellants, the State of Illinois, Illinois Commerce Commission, and North Shore Commuters Association (plaintiffs below) petition the Court to grant a rehearing and to reconsider its decision in this case.

In support of this petition, Appellants suggest that the Court overlooked, or misapprehended, certain controlling points set forth below.

PRELIMINARY STATEMENT.

This is an appeal from the judgment of a three-judge District Court (reported in *State of Illinois* v. *United States*, 213 Fed. Supp. 83) dismissing a complaint seeking to set aside and to enjoin enforcement of an order of the Interstate Commerce Commission authorizing Appellee, Chicago, North Shore & Milwaukee Railway Co. (herein called "the North Shore") to abandon its entire electric railroad.

The primary question in the case is whether the Interstate Commerce Commission had jurisdiction under Paragraphs (18) and (20) of Section 1 of the Interstate Commerce Act (Title 49 USC) to authorize the abandonment.

Paragraph (22) of Section 1 of the Act provides that the jurisdiction of the Commission to authorize abandonment "shall not extend to * * * street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation."

If then, the North Shore's railroad is an electric interurban railroad of the type specified in Paragraph (22), it is excluded by Act of Congress from the jurisdiction of the Interstate Commerce Commission, and the decision on the question as to whether abandonment should be authorized is left to the state commissions.

THE DECISION IN THE PRIOR NORTH SHORE CASE (288 U. S. 1) HOLDING THE NORTH SHORE TO BE A TYPICAL INTERURBAN ELECTRIC RAILROAD AND THE GROUNDS UPON WHICH THAT CASE WAS DISTINGUISHED HERE.

Section 20a of the Interstate Commerce Act, providing for approval of security issues by the Interstate Commerce Commission, contains a clause, identical with that in Paragraph (22) of Section 1 of that Act (except for substitution of the singular for the plural number) excepting from jurisdiction of the Commission under Section 20a "a street, suburban, or interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation."

In construing that clause in Section 20a, this Court held, in *United States* v. *Chicago, N. S. & M. R. R.*, 288 U. S. 1, decided in 1933 (referred to herein as "the prior North Shore case"), that the North Shore's railroad is "an interurban electric railway" of the type specified and therefore is excepted from the jurisdiction of the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act.

The decision of the three-judge District Court in the instant case (from which this appeal was taken) distinguished the decision in the prior North Shore case, and held it not applicable to the instant case, on the following grounds (213 Fed. Supp. at pp. 86-88):

> "The Supreme Court in *United States* v. *Chicago North Shore and Milwaukee Railroad*, 288 U. S. 1 (1933), held that the North Shore fell within the exemption of Section 20a of the Interstate Commerce Act. Section 20a contains wording which is identical to that of Section 1 (22). In examining the activities of the North Shore, the Court concluded:
>
> 'We thus have a typical example of an interurban electric line for passenger service, which

has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. The facts differentiate the case from *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, * * * There the railroad was predominantly a carrier of interchange carload freight. * * * The purely local traffic in freight, passengers, baggage and express was there relatively inconsequential; but here greatly preponderates.'

The Supreme Court was asked to conclude that the North Shore railroad had issued securities over a period of ten years in violation of Section 20, wherein such conclusions might have rendered these securities of no value. Throughout the period in which they were issued the Commission had never challenged the right or authority of the North Shore to issue these securities. That the Court's decision was influenced by an estoppel rationale based on the Railroad's reliance on past administrative rulings is evident:

'With this knowledge of the situation the Commission never, until it requested the attorney general to institute the present suit, by word or act intimated that the procedure followed by the railroad was illegal or the state regulatory bodies without jurisdiction. It would be difficult indeed to conceive a clearer case of uniform administration construction of § 20a as applied to this company. *Conceding that the proper classification of the railway is not free from difficulty*, all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons. * * * The primary responsibility rested upon the Commission to determine whether under the circumstances the railway was required to procure leave under § 20a. for the issuance of securities. Evidently entertaining serious doubts on this question it has for more than a decade resolved them in favor of the car-

> rier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation.' (Emphasis supplied.)
>
> . . . . .
>
> It is apparent from the decisions following the Supreme Court *North Shore* case that exemptions similar to Section 1(22), but which are found in other provisions of the Interstate Commerce Act, or in other Acts, allow different interpretations, depending on the purpose of the Act, the underlying issues, and the particular facts of the case."

This Court, in affirming, without opinion, the decision of the district court, presumably adopted the grounds stated in the opinion of that court, as above quoted, in support of the holding that this Court's decision in the prior *North Shore* case is not applicable to, and should not be followed in, the instant case.

POINTS RELIED UPON AS REQUIRING RECONSIDERATION BY THE COURT OF ITS DECISION IN THIS CASE.

We submit that in holding the decision in the prior *North Shore* case to be not applicable and in affirming the judgment of the District Court sustaining the jurisdiction of the Interstate Commerce Commission, this Court failed to give due weight to the following points.

1. The record shows that there has been no change in the character of the North Shore's railroad since the decision in the prior *North Shore* case in 1933, and if the clause excluding the Interstate Commerce Commission from jurisdiction over electric interurban roads was applicable to the North Shore's railroad then, it is equally applicable now.

2. In the prior *North Shore* case, the Court decided definitely that the North Shore's railroad must be classed as an interurban electric railway which is not part of a general steam railroad system of transportation, and that it is therefore specifically excluded from jurisdiction of the Interstate Commerce Commission under Section 20a. As grounds for that decision, the Court held:

(a) That the North Shore's railroad "*is a typical example of an interurban line for passenger service*" with such incidental freight traffic as could be developed "without interference with the main purpose of the carrier" (288 U. S. pp. 7-10); and hence that as "a matter of first impression * * * though the decision is not free from difficulty," the Court "would be inclined to hold Section 20a as inapplicable"—*i.e.*, that the North Shore's railroad is an electric interurban railroad excepted by the exclusion clause in question from the jurisdiction of the Interstate Commerce Commission (288 U. S., at pp. 10-11); and

(b) That all doubts as to the correctness of the conclusion that the North Shore's railroad is an interurban electric railroad of the type excluded from jurisdiction of the Commission are removed by consideration of the past administrative construction as to the character of the North Shore's railroad (288 U. S., at pp. 12-13).

On both grounds above stated, the adjudication was final that the North Shore's railroad is correctly classified as an electric interurban railroad excluded by statute (Section 20a in that case) from jurisdiction of the Interstate Commerce Commission.

3. It has thus been adjudicated that the jurisdiction exclusion clause in Section 20a applies to the North Shore's railroad and that the railroad is a "typical example of an interurban electric line" excepted by the exclusion clause from jurisdiction of the Interstate Commerce Commission.

The same construction must be given to the jurisdictional exclusion clause in Paragraph (22) of Section 1. The two clauses are in the same statute; are in the same words; and have the same purpose—*i. e.*, to exclude the Interstate Commerce Commission from jurisdiction over this type of electric railroad. They must be given the same meaning and application.

We submit the following suggestions in support of the foregoing propositions.

THE DECISION IN THE PRIOR NORTH SHORE CASE (288 U. S. 1) IS CONTROLLING IN THE INSTANT CASE ON THE QUESTION OF JURISDICTION.

1.

There Has Been No Change in the Character of the North Shore's Railroad Since the Decision in the Prior North Shore Case.

The principal ground upon which Appellees sought to distinguish this Court's decision in the prior *North Shore* case was that there is an interchange of freight by the North Shore's railroad with various connecting interstate carriers.

But the same condition existed when the prior *North Shore* case was decided in 1933. In fact, at that time the North Shore had 114 freight cars of its own and 22% of its revenue was derived from freight (288 U. S., at p. 9). During the period involved in the instant case, the North Shore owned no freight cars and its freight revenue had dropped to 14% of the total revenue. No freight is handled at either the Chicago or Milwaukee terminals and the passenger cars are all of the type that can operate on the elevated tracks in Chicago and over streetcar tracks in Milwaukee.

The interchange of freight with other railroads, at connecting points outside the city limits, was then in effect as it is now. But, as the Court stated (288 U. S. at pp. 9-10), such freight handling was [as it is now] incidental in character, compared with the primary purpose of North Shore—*i.e.*, to operate a "typical * * * interurban electric

line for passenger service," with freight service as a minor side line.

It cannot now be held that this incidental freight business destroys the character of the railroad as "an interurban electric railway" without wholly disregarding the decision of this Court in the prior *North Shore* case.

The decision in the prior *North Shore* case is as applicable to the North Shore's railroad today as it was when rendered in 1933.

2.

THE DECISION IN THE PRIOR NORTH SHORE CASE IS A DEFINITE ADJUDICATION THAT THE NORTH SHORE'S RAILROAD IS AN ELECTRIC INTERURBAN RAILROAD OF THE TYPE SPECIFICALLY EXCEPTED FROM THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION BY THE EXCLUSION CLAUSE IN SECTION 20a—WHICH IS THE SAME AS THE CORRESPONDING CLAUSE IN PARAGRAPH (22) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT.

The judgment of the District Court and the affirming order of this Court, holding that the decision in the prior *North Shore* case is not controlling here, rests mainly on the assumption that that decision was based on administrative construction in the nature of an estoppel, and that the decision would have been different if the case had rested wholly on an initial determination as to the character of the North Shore railroad.

Even if (contrary, as we believe, to the fact) that assumption were correct, the adjudication still was that the North Shore's railroad is, in fact, and was recognized in practice to be, an interurban electric railroad of a type excepted from the jurisdiction of the Interstate Commerce Commission under Section 20a. And, as shown in the

next subdivision below, if the exception applies under Section 20a, it must also apply under the clause of the same wording in Paragraph (22) of Section 1.

Whatever the ground for the adjudication, it must be given effect. It characterizes the railroad and that characterization is controlling in construing a like exclusion clause in any other section of the Interstate Commerce Act.

But there is no ground for assuming that the decision of the Court in the prior *North Shore* case rested wholly on administrative construction in the nature of an estoppel. An estoppel, or administrative construction, would not confer jurisdiction on the Interstate Commerce Commission where it was not conferred by statute. The administrative construction merely indicated a recognition by the administrative officials of the fact that the North Shore's railroad is "an electric interurban railroad" of a character excepted from jurisdiction of the Commission and confirmed the opinion of the Court that (irrespective of administrative construction) the North Shore's railroad was of that type.

An examination of the opinion in the prior *North Shore* case shows that the greater part of it (288 U. S. pp. 6-11) is given to showing—without mention of administrative construction—that the North Shore's railroad is an electric interurban railroad of the type described in the exclusion clause in Section 20a (the same in wording as that in Paragraph (22) of Section 1).

As was said by this Court, after a thorough review and analysis of the facts showing the character of the railroad (288 U. S. p. 10):

> "The railroad was constructed to afford a fast electric passenger service between Chicago and Milwaukee and suburban passenger service into and out of Chicago. The freight business is subsidiary to this primary function, and is not fairly comparable to that

ordinarily transacted by a standard steam railroad. Passenger traffic, whether measured by car service or by gross earnings, heavily preponderates over interline freight business. The main terminals serve only the passenger and merchandise freight traffic.

We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier."

The Court then, after distinguishing *Piedmont & Northern Ry. Co.* v. *Interstate Com. Com.*, 286 U. S. 299 on the ground that the Piedmont Railway was predominantly a freight carrier, continued, as follows (288 U. S., pp. 10-11):

"If the status of the appellee were a matter of first impression, we should, though the decision is not free from difficulty, be inclined to hold Section 20a inapplicable."

After arriving at the foregoing conclusion, the Court then, for the first time, comments on the fact that the Interstate Commerce Commission had recognized the characterization of the North Shore's railroad as "an electric interurban railway" excepted by the exclusion clause from jurisdiction of the Commission, and in the issue by the North Shore of securities approved only by the State Commission.

The Court held this administrative construction to be clearly in accord with the Court's interpretation of the exclusion clause and confirmed the conclusion that the North Shore's railroad was of a type excluded from the jurisdiction of the Commission.

The decision that the North Shore's railroad is "a typical example of an interurban line for passenger service" and that it is therefore excepted by the exclusion clause in Section 20a (and here also by the same clause

in Paragraph (22) of Section 1) is thus based on an analysis of the character of the railroad as supported by the acquiescence of the enforcing authorities over an extended period.

And that decision was adhered to and followed in litigation before the State Commissions on all transportation matters (including abandonment suits as well as security issues and "spin-offs") through 1953 and until the Shore Line Abandonment case was filed in 1954.

The Shore Line Abandonment case (290 ICC 765) was decided by a division of three commissioners, one of whom dissented on the ground that under the prior *North Shore* case the Interstate Commerce Commission had no jurisdiction. The case was not carried further as the State Commission acquiesced in the abandonment.

We submit that the decision in the prior *North Shore* case (288 U. S. 1) is controlling and definitely adjudicates that the North Shore's railroad is "an interurban electric railway which is not part of a steam railroad system of transportation" and is therefore excepted from the jurisdiction of the Interstate Commerce Commission by the exclusion clause there in question.

3.

THE EXCLUSION CLAUSE IN PARAGRAPH (1) OF SECTION 1 AND THE CORRESPONDING CLAUSE IN SECTION 20a ARE IN THE SAME WORDS AND FOR THE SAME PURPOSE. THE TWO CLAUSES MUST, THEREFORE, BE GIVEN THE SAME CONSTRUCTION.

The language of the exclusion clause in Paragraph (1) of Section 1 of the Interstate Commerce Act is the same as that in Section 20a held by this Court in the prior *North Shore* case not to apply to the North Shore's railroad.

The purpose of each of the two clauses is also the same (*i.e.*, to exclude from the jurisdiction of the Interstate Commerce Commission electric interurban railroads of the type specified.

Where the same words or phrases are used with a similar purpose in different parts of the same statute, they will be presumed to have the same meaning and application.

Schooler v. *United States*, 231 Fed. 2d (CA 8), 560 (563).

Com. of Int. Rev. v. *Ridgeway's Estate*, 291 Fed. 2d (CA 3), 257 (259).

As was said in the last-cited case (291 Fed. 2d at p. 259):

> "Where a word or phrase is used in different parts of the same statute it will be presumed to have the same meaning throughout * * * [citing cases] * * *. The need for uniformity becomes more imperative where the same word or term is used in different sections that are similar in import and content."

And the similarity in language and purpose was recognized by this Court in the prior *North Shore* case, where this Court, in distinguishing, on other grounds, the construction of Paragraph (22) of Section 1 involved in the *Piedmont Railroad* case (286 U. S. 299), noted that the exclusion clause in Paragraph (22) of Section 1 is "*couched in the same language,*" and therefore, subject to the same construction, as the exclusion clause in Section 20a at issue in the prior *North Shore* case (see 288 U. S. at p. 10).

If the North Shore's railroad is excepted by the exclusion clause in Section 20a from the jurisdiction of the Commission under that Section because, as this Court said (288 U. S., at p. 10), it is "a typical example of an interurban line for passenger service," the railroad must be excepted for the same reason from the jurisdiction of the

Commission under the like exclusion clause in Paragraph (22) of Section 1.

The North Shore's railroad cannot be treated as an interurban electric railway not subject to the Commission's jurisdiction, for one purpose, and treated as a different kind of railroad, subject to the Commission's jurisdiction, for another purpose, depending upon which characterization may seem preferable to the North Shore or to the Commission.

THE ALLEGED OPERATING LOSSES.

The only question before this Court is as to the jurisdiction of the Interstate Commerce Commission.

The presence or absence of operating losses has no bearing on that question.

Furthermore, pending the decision in this case, there can be no "operating losses" of consequence. The North Shore suspended operation of its railroad shortly after judgment of the District Court, here appealed from; and although the equipment remains in place, no operations are being carried on.

We submit:

1. That this petition for rehearing should be granted.

2. That the decision of this Court should be reconsidered and the motions of appellees to affirm the judgment of the District Court should be denied.

3. That the questions presented by this appeal are substantial and of such serious import as to require plenary consideration with briefs on the merits and oral argument for their determination; and

4. That probable jurisdiction should be noted.

Respectfully submitted,

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certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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